

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/1. INTRODUCTION/(1) MEANING AND CLASSIFICATION/1. Meaning of 'bailment'.

BAILMENT (

1. INTRODUCTION

(1) MEANING AND CLASSIFICATION

1. Meaning of 'bailment'.

Under modern law¹, a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor)². The legal relationship of bailor and bailee can exist independently of any contract, and is created by the voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding³. The element common to all types of bailment is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods⁴. A claim against a bailee can be regarded as a claim on its own, *sui generis*, arising out of the possession had by the bailee of the goods⁵.

A bailment is distinguishable from a sale⁶, which is effected wherever chattels are delivered on a contract for a money consideration called the price, and not for the return of the identical chattels in their original or an altered form⁷. It must also be distinguished from the relationship of *mutuum*, which involves the delivery of fungible goods by an existing owner accompanied by an obligation on the part of the deliverer to deliver equivalent but different goods back to the deliveror⁸. The relationship of bailor and bailee is also to be distinguished from the relationship of licensor and licensee which, in the absence of special contractual provisions, carries no active obligation on the part of the licensor towards the licensee in relation to the chattel subject to the licence⁹.

To constitute a bailment (which derives its name from the old French word *bailier*, to deliver or put into the hands of), the actual or constructive possession of a specific chattel must be vacated by its owner or possessor (the bailor), or his agent duly authorised for that purpose, in favour of another person (the bailee)¹⁰ in order that the latter may keep the same or perform some act in connection with it, for which such actual or constructive possession of the chattel is necessary, thereafter returning the identical subject matter in its original or an altered form¹¹.

Thus a bailment may arise by attornment involving a constructive delivery of possession, as where, for example, a warehouseman holding goods as agent for an owner agreed to hold them for another person pursuant to the owner's instructions¹². There can be a bailment by an owner without his ever having taken possession of the chattel concerned, so long as the title to it or the right to possess it has passed to him¹³.

1 A bailment, traditionally defined, is a delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed. See *Bac Abr Bailment*; and see also 2 *Bl Com* 452; Jones on Bailments (4th Edn, 1833) pp 1, 117; Story on Bailments (9th Edn, 1878) s 2; 2 *Kent's Com Pt V*, s 559; 1 *Bell's Com lib 2*, Pt 3, c 2, s 4, art 2. This definition was approved and adopted in *Re S Davis & Co Ltd* [1945] Ch 402. But modern authority rejects the universal equation between bailment and contract (while recognising of course that many bailments are contractual): see the text. Modern authority has also clarified the relationship between bailment and trust, emphasising that since bailment can give rise to legal remedies a person must have a legal and not merely an

equitable interest in the chattel in order to qualify as a bailor: *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA (which appears to accept that a right of possession arising from an equitable interest might suffice to qualify the holder to sue in conversion and thereby suggests that the holder of such a right might also stand as a bailor of the possessor). The use of the word 'trust' in the definition cited earlier in this note does not signify that bailments are a form of trust in the literal sense, but rather that, in the ordinary case, the goods are entrusted to the bailee. A bailor's interest (or 'reversion') need not consist of full residual ownership in the chattel, but might take the form of a right of possession superior to that of the possessor, which right of possession might be immediate or deferred according to circumstance: *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *Mayflower Foods Ltd v Barnard Bros Ltd* (9 August 1996, unreported), Judge Hegarty QC; *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA; *The Hamburg Star* [1994] 1 Lloyd's Rep 399, QB; and see further Palmer 'Possessory Title' in *Interests in Goods* (2nd Edn, 1998) ch 3: cf *MCC Proceeds Inc v Lehman Bros International (Europe)* supra; *China-Pacific SA v Food Corpn of India* [1982] AC 939, [1981] 3 All ER 688, HL. It appears that the necessary right of possession might be purely contractual in origin: *MCC Proceeds Inc v Lehman Bros International (Europe)* supra per Mummery, Pill and (semble) Hobhouse LJ, citing Buckley LJ in *International Factors Ltd v Rodriguez* [1979] QB 351, [1979] 1 All ER 17, CA. It is possible that two people might enjoy concurrent rights of immediate possession over a chattel in particular circumstances: *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* supra. It has been held that 'The important question is not the literal meaning of bailment but the circle of relationships within which its characteristic duties will apply. For most practical purposes, any person who comes knowingly into the possession of another's goods is, prima facie, a bailee': Palmer *Bailment* (2nd Edn, 1991) p 1285, cited in *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* supra per Mance LJ. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq.

2 *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] AC 324, [1994] 2 All ER 250, [1994] 1 Lloyd's Rep 593, PC; *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *Sandeman Coprimar SA v Transitos y Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, [2003] 2 Lloyd's Rep 172; *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb); *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 405, CA, per Bingham LJ: cf *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561. A possessor who is unaware that he is in possession of goods belonging to another is not a bailee, but he may owe to the owner a duty to take reasonable care to identify the owner's interest before destroying or otherwise dealing in the goods: *AVX Ltd v EGM Solders Ltd* (1982) Times, 7 July ('unconscious' bailees held liable for destroying or otherwise dealing in goods which they erroneously believed to be their property). Cf *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* supra where the claimant sought to impose a similar duty of care on an auctioneer who had returned to the person who had delivered it to the auctioneer for sale a stolen painting that had been previously registered on a professional register of stolen art; the court (distinguishing *AVX Ltd v EGM Solders Ltd* supra) refused to discover any duty of care on the defendant possessor to check who was entitled to the painting before returning it.

3 See *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 731-732, [1965] 2 All ER 725 at 734-735, CA, per Diplock LJ; *Fairline Shipping Corpn Ltd v Adamson* [1975] QB 180 at 189, [1974] 2 All ER 967 at 975 per Kerr J; *Parastatidis v Kotaridis* [1978] VR 449 at 454-455 per Harris J; *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546 at 551 per Cory JA; *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 405, CA, per Bingham LJ. See also *East West Corpn v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *Sandeman Coprimar SA v Transitos y Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, [2003] 2 Lloyd's Rep 172. As to bailment by finding see para 11 post; as to sub-bailment see para 41 post.

4 *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] AC 324, [1994] 2 All ER 250, [1994] 1 Lloyd's Rep 593, PC; *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825 at 831, [1970] 1 WLR 1262 at 1268, PC. See also *Global Dress Co Ltd v WH Boase & Co Ltd* [1966] 2 Lloyd's Rep 72 at 76, CA; *Learoyd Bros & Co and Huddersfield Fine Worsteds Ltd v Pope & Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep 142 at 147-148; *Moukattaf v British Overseas Airways Corpn* [1967] 1 Lloyd's Rep 396 at 416; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280; *Chesworth v Farrar* [1967] 1 QB 407 at 415-416, [1966] 2 All ER 107 at 112; and para 41 post.

5 See *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247 at 261, [1965] 1 All ER 163 at 167, CA, per Lord Denning MR; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 167-168 per Steyn J; *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86, (1995) 159 JP 770, CA; and see *Sandeman Coprimar SA v Transitos y Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, [2003] 2 Lloyd's Rep 172.

6 See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 1. Where goods are delivered to a buyer under a contract of sale which contains a reservation of title clause, the relationship may concurrently amount to one of bailment: *Clough Mill Ltd v Martin* [1984] 3 All ER 982 at 987, [1985] 1 WLR 111 at 116, CA, per Goff LJ; cf *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA. As to

transactions between brewers and mineral water manufacturers and their customers which amount to bailments and not sales of bottles see *Cantrell and Cochrane Ltd v Neeson* [1926] NI 107, CA; *Barlow & Co v Hanslip* [1926] NI 113n (an English decision). See also *William Leitch & Co Ltd v Leydon, AG Barr & Co Ltd v Macgeoghegan* [1931] AC 90, HL.

7 *South Australian Insurance Co v Randell* (1869) LR 3 PC 101 at 108, 113, approving 2 Kent's Com (11th Edn) s 589; *Mercur v Craven Grain Storage Ltd* (17 March 1994, unreported), HL; *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb).

8 See *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb), CA; and para 34 post.

9 *Ashby v Tolhurst* [1937] 2 KB 242 at 249, [1937] 2 All ER 837 at 840, CA, per Greene MR (held no delivery of possession; only a licence to leave car on parking ground); *Tinsley v Dudley* [1951] 2 KB 18 at 26, [1951] 1 All ER 252 at 256-257, CA, per Evershed MR (parking of vehicles by invitation or permission on private ground: no transfer of possession or custody); and see also *BRS (Contracts) Ltd v Colney Motor Engineering Co Ltd* (1958) Times, 27 November, CA; *BG Transport Service Ltd v Marston Motor Co Ltd* [1970] 1 Lloyd's Rep 371 (both vehicle parking cases: no bailment); *Fred Chappell Ltd v National Car Parks Ltd* (1987) Times, 22 May (retention of keys by vehicle owner, and no barrier at car park: no bailment); *Lotus Cars Ltd v Southampton Cargo Handling plc, The Rigoletto* [2000] 2 All ER (Comm) 705, [2000] 2 Lloyd's Rep 532, CA; *PF Walsh Plant Ltd v Wilton Contracts (London) Ltd* (17 March 2000, unreported), CA. A caravan site owner is not ordinarily a bailee of the caravans, but if he undertakes winter storage he may become a bailee then: *Halbauer v Brighton Corp* [1954] 2 All ER 707, [1954] 1 WLR 1161, CA, applied in *Hinks v Fleet* [1987] BTLC 289, CA; but see *Wilmer and Gladwin Pty Co v WAL Building Supplies Pty Ltd* (1955) 55 SR NSW 442, NSW SC (plaintiff rented storage bay in building; for access he had to communicate with defendant, who had the only key but who never handled the plaintiff's goods: held no bailment).

10 For delivery, there must be a transfer of the exclusive right of possession: see *Midland Silicones Ltd v Scruttons Ltd* [1959] 2 QB 171 at 189, [1959] 2 All ER 289 at 296; on appeal [1961] 1 QB 106 at 119, [1960] 2 All ER 737 at 740, CA; affd sub nom *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 470, [1962] 1 All ER 1 at 8, HL (no bailment); *Lotus Cars Ltd v Southampton Cargo Handling plc, The Rigoletto* [2000] 2 All ER (Comm) 705, [2000] 2 Lloyd's Rep 532, CA; *Spectra International plc v Hayesock Ltd* [1997] 1 Lloyd's Rep 153, Central London Criminal Court (ie at first instance: see also [1998] 1 Lloyd's Rep 162, CA). As to constructive delivery where a seller continues to hold goods as bailee for the buyer see *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] QB 514, [2001] 1 All ER 148, CA: cf *Forsythe International (UK) Ltd v Silver Shipping Co Ltd and Petroglobe International Ltd, The Saetta* [1994] 1 All ER 851, [1994] 1 WLR 1334, [1993] 2 Lloyd's Rep 268, QB. Placing a coat in an unattended anteroom at a hotel may in particular circumstances amount to delivery of possession: *Samuel v Westminster Wine Co Ltd* (1959) Times, 16 May. See also *Shorters Parking Station Ltd v Johnson* [1963] NZLR 135, NZ SC; *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA (both vehicle parking cases in which cars were left in garage attendant's custody: held to be bailment in each case). For a comparison of the relationship of bailor and bailee with that of master and servant see *Fowler v Lock* (1872) LR 7 CP 272 (on appeal (1874) LR 9 CP 751n); *Venables v Smith* (1877) 2 QBD 279; *Gates v R Bill & Son* [1902] 2 KB 38, CA; and cf *Hewitt v Bonvin* [1940] 1 KB 188, CA. See further EMPLOYMENT vol 39 (2009) PARA 6. Cases may occur in which there is a transfer of possession intended by both parties to be a bailment, though obtained by the transferee by deceit; and then perhaps there is a contract of bailment (though voidable by the bailor), for there is a real consent by him (though induced by fraud) and the taking would not be trespassory and would not therefore amount to theft. If, however, one party means only to give a bailment and the other party accepts the chattel, meaning not to hold it on a bailment but to appropriate it contrary to the known intention of the bailor, there is no concurrence of intention and no contract; there is only an outward appearance of consent on the bailor's part to the physical delivery of the chattel, and the possession therefore does not pass by contract but by wrong. In such a case the taking of the chattel by the pretended bailee is trespassory and will support an indictment for theft: see *Lake v Simmons* [1927] AC 487, HL, distinguished in *John Rigby (Haulage) Ltd v Reliance Marine Insurance Co Ltd* [1956] 2 QB 468, [1956] 3 All ER 1, CA. See also the Theft Act 1968 ss 1-6, 15; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 282 et seq.

11 *South Australian Insurance Co v Randell* (1869) LR 3 PC 101. Cf *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA; *Clough Mill Ltd v Martin* [1984] 3 All ER 982 at 987, [1985] 1 WLR 111 at 116, CA, per Goff LJ (bailment may arise although bailee empowered to intermix goods or dispose of them to third parties). But cf *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb).

12 See *Dublin City Distillery Ltd v Doherty* [1914] AC 823 at 847, HL, per Lord Atkinson; and see para 82 post. Cf *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 806, PC; *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.

13 *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210 at 217, [1970] 3 All ER 664 at 667, CA (plaintiff finance company obtained title to car under executed illegal contract of sale and, without taking delivery of it,

hired it out to a company which converted it: hiring company held to be bailees); *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 135, CA, per Slade LJ (where the point was not decided); *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA; *Johnson Matthey Ltd v Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215.

UPDATE

1 Meaning of 'bailment'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/1. INTRODUCTION/(1) MEANING AND CLASSIFICATION/2. Classification.

2. Classification.

The legal concept of bailment as creating a relationship which gives rise to legal duties owed on each side is derived from Roman law¹. In the leading case bailment was divided into six classes², which were later rearranged into five classes³, as follows:

- 1 (1) the gratuitous deposit⁴ of a chattel with the bailee, who is simply to keep it for the bailor;
- 2 (2) the delivery⁵ of a chattel to the bailee, who is to do something without reward for the bailee to or with the chattel;
- 3 (3) the gratuitous loan⁶ of a chattel by the bailor to the bailee for the bailee to use;
- 4 (4) the pawn or pledge⁷ of a chattel by the bailor to the bailee, who is to hold it as a security for a loan⁸ or debt or the fulfilment of an obligation; and
- 5 (5) the hire⁹ of a chattel or services by the bailor to the bailee for reward.

Bailments may also be classified as being either gratuitous or for reward: thus the first three classes above mentioned, being without recompense, are designated gratuitous bailments; the others are bailments for reward, or for valuable consideration. Of the three kinds of gratuitous bailments, it will be noticed that the first two are wholly for the benefit of the bailor, and the third wholly for the benefit of the bailee. This classification is the one adopted in this title, which deals only with the general law of bailment and not with particular forms of bailment, for which reference should be made to other titles¹⁰.

Modern authority now recognises many variations on these basic models of bailment¹¹, and many examples that do not fit precisely into any particular category¹². One form of bailment to which much importance has become attached in modern times to the contract of hire-purchase, which has in it not only the element of bailment, but also the element of sale¹³. This type of contract is considered separately in this work¹⁴.

1 See *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 731, [1965] 2 All ER 725 at 734, CA, per Diplock LJ. See also *East West Corpn v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700. The works of such foreign jurists as Pothier and Domat have in the past been cited, together with the law as found in the Digest and Institutes of Justinian: Just Inst lib 3, tit 14, 24.

2 See *Coggs v Bernard* (1703) 2 Ld Raym 909 per Holt CJ.

3 See Jones on Bailment (1st Edn, 1781) pp 35-36. Story considered that bailment might be rearranged in three classes: (1) in which the trust is exclusively for the bailor's or a third person's benefit; (2) in which the trust is exclusively for the bailee's benefit; and (3) in which the trust is for the benefit of both parties or of both or one of them and a third party: Story on Bailments (9th Edn, 1878) s 3. Story in his treatise nevertheless adhered to Jones's classification; so did Chancellor Kent: 2 Kent's Com Pt V, s 559. For further discussion of the various classifications of bailment see Palmer *Bailment* (2nd Edn, 1991) ch 2.

4 *le depositum*. See further paras 6-19 post.

5 *le mandatum*. See further paras 20-28 post.

6 *le commodatum*. See further paras 29-37 post.

7 *le pignus*, sometimes called *vadium*: see para 81 post.

8 Where interest is payable on the loan in respect of which the chattel is held as security by the bailee, he can aptly be described as a bailee for mutual advantage: see *Canadian Imperial Bank of Commerce v Doucette* (1968) 70 DLR (2d) 657 (PEI SC in banco) (bank in possession of machinery by seizure under statutory lien and claim).

9 *le locatio conductio*. This is sometimes divided into four sub-classes: (1) the hiring of a chattel for use (*locatio rei*) (see paras 50-62 post); (2) the hiring of work or labour on or with regard to a chattel (*locatio operis faciendi*) (see paras 63-80 post); (3) the hiring of custody, ie of services in and about the keeping of the chattel (*locatio custodiae*) (see paras 38-49 post); and (4) the hire of the carriage of chattels (*locatio operis mercium vehendarum*) (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 1).

10 See eg AGENCY; AUCTION; CARRIAGE AND CARRIERS; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq; LICENSING AND GAMBLING vol 67 (2008) PARA 197 et seq; LIEN.

11 See Palmer *Bailment* (2nd Edn, 1991) pp 124-125.

12 See eg *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236, HC of Aust.

13 See para 52 post. As to sale see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 1 et seq.

14 See CONSUMER CREDIT vol 9(1) (Reissue) para 23 et seq.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/1. INTRODUCTION/(1) MEANING AND CLASSIFICATION/3. Degree of care and diligence.

3. Degree of care and diligence.

Of the various rights and duties of bailors and bailees, that most discussed is the degree of care and diligence required of the bailee in each kind of bailment. That degree has, from the time of the Roman Empire until fairly recent times, been held to vary according to the benefits derived from the bailment by the bailor and the bailee respectively¹. Thus an ordinary degree of care and skill was traditionally required where both benefited from the transaction²; slighter diligence, perhaps, where the benefit was wholly that of the bailor³; and greater diligence where the benefit accrued only to the bailee⁴. More recently, however, it has been recognised that the common law duty of every bailee is to take reasonable care of his bailor's goods, and not to convert them⁵. The standard of care required is therefore the standard demanded by the circumstances of each particular case⁶. To try to put a bailment into a watertight compartment, such as gratuitous bailment or bailment for reward, can be misleading⁷ although there can perhaps be said to be some general duties in most situations⁸. It must be remembered, however, that bailment is frequently a contract, and the parties may always vary the incidents by the terms of the contract⁹. Their failure to take this opportunity can result in their being denied the benefit of a duty that might otherwise have been consensually imposed¹⁰.

1 *Giblin v McMullen* (1868) LR 2 PC 317.

2 Is a bailment for mutual advantage: see para 2 note 3 ante.

3 Eg as in the first two classes mentioned in para 2 ante.

4 Eg as in the third class mentioned in para 2 ante.

5 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 726, 732, 738, [1965] 2 All ER 725 at 731, 735, 738, CA. See also *East West Corpn v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700 (a bailee has a general duty not to convert goods and to protect them from theft, loss or damage, and he has a responsibility for the acts of others whose services he engaged to fulfil his duty).

6 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 698, [1962] 2 All ER 159 at 161, CA. See also *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86, (1995) 159 JP 770, CA (discussing the duty of care owed by the police to the owner of a seized vehicle while the vehicle is in their possession); *East West Corpn v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700 (the nature of a bailee's duties varies according to the circumstances in which and the purposes for which the goods were delivered to the bailee); *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May) (bailee has a personal obligation to look after goods). See also *Swann v Seal* (19 March 1999, unreported), CA; *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb). If you confide a casket of jewels to the custody of a yokel, you cannot expect him to take the same care of it that a banker would. See Jones on Bailment (4th Edn, 1833) p 100. See also paras 6 note 10, 15, 39 post. As to conversion, bailment and the police see TORT vol 45(2) (Reissue) para 609.

7 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 698, [1962] 2 All ER 159 at 161, CA.

8 Eg the duty to collect goods within a reasonable time: see *Jerry Juhan Developments SA v Avon Tyres Ltd* (1999) Times, 25 January (see also paras 11, 80 post).

9 See eg *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb).

10 See eg *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb).

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/1. INTRODUCTION/(2) JOINT BAILORS AND JOINT BAILEES/4. Joint bailors.

(2) JOINT BAILORS AND JOINT BAILEES

4. Joint bailors.

Where chattels belonging to co-owners are delivered to a bailee to hold on behalf of all, it is implied, unless expressly stipulated to the contrary, that he shall deliver up possession only upon the demand of all the co-owners¹. He is, therefore, justified in refusing to redeliver the chattels on the demand of one or some of them only, and a claim will not lie against him for such a refusal². But if, in such a case, he delivers up the chattels to one of the co-owners upon his sole request, no claim will lie against him for so doing unless all the bailors join for that purpose; and as the person to whom they were actually redelivered cannot join with his co-owners in maintaining a claim for a breach occasioned by his own act, no claim will lie against the bailee³. As, however, the bailee would occupy a position equivalent to that of a trustee of the chattels for all the co-owners, he would be held liable in equity to those who were injured by his breach of trust⁴. Two co-owners, having made a joint demand, may bring separate claims⁵.

1 *Broadbent v Ledward* (1839) 11 Ad & El 209.

2 *Atwood v Ernest* (1853) 13 CB 881; *May v Harvey* (1811) 13 East 197; *Nathan v Buckland* (1818) 2 Moore CP 153. But it is otherwise if one co-owner has a special property in the entire chattel (*Nyberg v Handelaar*

[1892] 2 QB 202, CA; cf *Khan v Grocutt* [2002] EWCA Civ 1945, [2003] RTR 314, [2003] Lloyd's Rep IR 464, or if, though belonging to co-owners, the chattel is delivered to the bailee by one only to hold on his behalf (*May v Harvey* supra), in which case the bailee would be estopped from denying the bailor's title: see para 82 post. *Broadbent v Ledward* (1839) 11 Ad & El 209, turned upon a question of pleading only, and the observation of Lord Denman CJ at 212, that if any inconvenient consequence arises to the defendant from detaining the property of joint owners, it might have been avoided by giving it up to any of them, is a dictum only. If it means that, in general, a bailee, entrusted by co-owners with property to hold on behalf of all, may lawfully deliver it to one, without the authority or even against the wish of the others, it cannot, it is submitted, be regarded as law. See also *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA where it was held that a person had title to sue in conversion if he had either actual possession or an immediate legal right to possession at the time of conversion, not merely an equitable interest in the goods. It appears from the court's approval in this case of a statement by Buckley LJ in *International Factors Ltd v Rodriguez* [1979] QB 351 at 359-360, [1979] 1 All ER 17 at 22, CA, that this right of immediate possession can arise from contract and exist without any underlying proprietary right. See further TORT vol 45(2) (Reissue) para 560.

3 *Brandon v Scott* (1857) 7 E & B 234.

4 *Brandon v Scott* (1857) 7 E & B 234 at 237 per Lord Campbell CJ. See also *Harper v Godsell* (1870) LR 5 QB 422.

5 *Bleaden v Hancock* (1829) 4 C & P 152.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/1. INTRODUCTION/(2) JOINT BAILORS AND JOINT BAILEES/5. Joint bailees.

5. Joint bailees.

Where a chattel is bailed to two or more bailees, each is responsible for the acts and defaults of his co-bailees done or made within the scope of their authority¹. Probably, however, a joint bailee is not responsible if the act or default is not negligence in the performance of the bailment, but something wholly outside it².

1 *Davey v Chamberlain* (1802) 4 Esp 229; *Coupé Co v Maddick* [1891] 2 QB 413 at 415 per Cave J; Story on Bailments (9th Edn, 1878) s 116.

2 Story on Bailments (9th Edn, 1878) s 116. This would seem to follow upon principle from the analogous cases of a bailee's responsibility for his servants. See paras 42, 61, 91 post; and see *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(i) Meaning and Categories of Deposit/6. Meaning of 'deposit'.

2. GRATUITOUS BAILMENT

(1) DEPOSIT

(i) Meaning and Categories of Deposit

6. Meaning of 'deposit'.

Bailment by deposit¹ may be defined as a bailment of a chattel, to be kept for the bailor gratuitously², and returned upon demand³. This definition is sufficient for most purposes, and is complete, if it is understood that a return to the bailor covers delivery over to his nominee, for in some cases the primary object of the bailment may be that the bailee delivers over the

chattel upon demand to a third party, and not to the actual bailor himself. This kind of bailment must always relate to a specific chattel⁴.

As the bailee is to receive no reward for his services, there can never be an executory contract of deposit, for there can be no claim upon an unsupported agreement⁵, and until there is actual delivery and acceptance of the subject matter of the trust, there is no obligation on the bailee's part to carry out his promise⁶. In similar vein, the bailment by way of deposit is not a contract even after the bailee has taken possession⁷. As soon, however, as the bailee actually accepts⁸ the chattel, he becomes in some degree responsible for it⁹ whilst it remains in his possession or under his control, and is also bound, upon demand¹⁰, to redeliver it to the true owner or his nominee, unless he has good excuse in law for not doing so¹¹.

1 le *depositum*: see para 2 ante.

2 A bailment may be a bailment for reward even though the consideration does not flow from the bailor. Thus if a member of a tenant's family deposits baggage with the landlord in the baggage room of the building containing the tenant's flat, the bailment is not gratuitous: *Andrews v Home Flats Ltd* [1945] 2 All ER 698, CA; cf *Chapman (or Oliver) v Saddler & Co* [1929] AC 584 at 596, HL (business operation in which bailor and bailee both relied for safety on the care of the bailor); *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May) (bailment not gratuitous as goods had been received and kept at claimant's yard as part of contractual obligations to transport them onwards); and see para 38 post. See also *Khan v Grocutt* [2002] EWCA Civ 1945, [2003] RTR 314, [2003] Lloyd's Rep IR 464, where the gratuitous bailment was care of vital insurance documents.

3 2 Bl Com 453. See also para 83 post.

4 Pothier's *Contrat de Dépôt* s 2.

5 le the maxim *ex nudo pacto non oritur actio* applies. See *Parastitidis v Kotaridis* [1978] VR 449 at 455 per Harris J (obiter).

6 Pothier's *Contrat de Dépôt* s 7.

7 See Palmer *Bailment* (2nd Edn, 1991) ch 9.

8 See *Blount v War Office* [1953] 1 All ER 1071, [1953] 1 WLR 736 (acceptance of goods although locked in strong room of requisitioned building).

9 See *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA; and para 3 ante.

10 Quaere whether, in particular circumstances, the bailor might be bound by a promise not to call for redelivery before a particular time: see Palmer *Bailment* (2nd Edn, 1991) p 583 (such a promise supported by consideration) and see further para 19 post. For the circumstances under which demand and refusal are or are not necessary to found a claim see para 85 post.

11 *Coggs v Bernard* (1703) 2 Ld Raym 909; *Phipps v New Claridge's Hotel Ltd* (1905) 22 TLR 49 (plaintiff handed over dog to one of defendant's servants, and as the dog could not be found when wanted, the defendant was liable); *Ultzen v Nicols* [1894] 1 QB 92 (where a diner at a restaurant handed his coat to a waiter, and it was gone when sought for). See also *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL (delivery by bailee to true owner would have been illegal by the proper law of the contract of bailment between bailor and bailee). The same rule appears to apply to all kinds of bailment. If the chattels bailed are not forthcoming, or are damaged, the onus is in the first place upon the bailee to show circumstances negating negligence on his part: *Port Swettenham Authority v TW Wuv & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA; cf *Thomas v High* [1960] SR NSW 401, NSW FC. See also *Wiehe v Dennis Bros* (1913) 29 TLR 250 (pony left in possession of vendor); *Williams v Curzon Syndicate Ltd* (1919) 35 TLR 475, CA (goods deposited at club and stolen by porter who had been engaged without sufficient inquiry into his antecedents); *Copland v Brogan* 1916 SC 277 (gratuitous carriage of bag containing money); cf *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 at 538-539, [1936] 3 All ER 696 at 701-702, CA; *Gutter v Tait* (1947) 177 LT 1, CA (bailee robbed partly owing to his own lack of care); *Ballet v Mingay* [1943] KB 281, [1943] 1 All ER 143, CA (failure of bailee who had parted with goods to prove that his parting with them was within purview of contract); and see para 43 note 3 post. The bailee need not establish the precise cause of the loss: *Bullen v Swan Electric Engraving Co* (1907) 23 TLR 258, CA; *Phipps v New Claridge's Hotel Ltd* supra; and see also *Brook's Wharf and Bull Wharf Ltd v Goodman*

Bros supra; and para 43 notes 4, 5 post. Cf *Woods v Duncan* [1946] AC 401, [1946] 1 All ER 420n, HL; and see paras 15, 26, 30 post. As to the onus of proof in the case of bailment for reward see para 43 post.

UPDATE

6 Meaning of 'deposit'

NOTE 11--See *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 2, [2009] 2 All ER 986.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(i) Meaning and Categories of Deposit/7. Necessary deposit.

7. Necessary deposit.

A necessary deposit is one which is made under peculiar stress of circumstances, such as fire, flood, shipwreck, civil riot, or other unforeseen disaster. If, under such conditions, an owner of a chattel entrusts it to the care of a bystander or neighbour, and that person accepts it, it has been suggested that the confidence of the owner in the recipient, and the acceptance by him, constitute an obligation which can be satisfied only by a very strict measure of care on the part of the bailee; but it seems that his duties are merely those of any ordinary depositary¹. Consequently the owner would probably recover damages only in the event of the depositary's being guilty of negligence or bad faith whilst the chattel was in his custody².

1 Jones on Bailments (4th Edn, 1833) p 48; Story on Bailments (9th Edn, 1878) s 83.

2 Story on Bailments (9th Edn, 1878) s 83.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(i) Meaning and Categories of Deposit/8. Deposit under mistake.

8. Deposit under mistake.

If a man who is mentally incapable of appreciating what he is doing, or who is under a mistake as to the identity of the person with whom he is dealing, entrusts another with a chattel, the recipient becomes a bailee¹. This is consistent with the general principle that a bailment arises whenever one person is voluntarily in possession of goods that belong to another, and that it is the consent of the putative bailor that is critical to bailment, the consent of the putative bailor being generally² immaterial to the relationship³.

1 *R v Reeves* (1859) 5 Jur NS 716, where a man who was lying on the ground, partially tipsy, permitted an acquaintance to take his watch out of his pocket on the supposition that the acquaintance was actuated by a friendly motive; it was held that the evidence was sufficient to convict the person of the statutory offence of larceny as a bailee (ie now the offence of theft: see the Theft Act 1968 ss 1-6; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 282 et seq).

2 Cf the relationship of sub-bailment: see para 41 post.

3 *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] AC 324, [1994] 2 All ER 250, [1994] 1 Lloyd's Rep 593, PC.

UPDATE

8 Deposit under mistake

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(i) Meaning and Categories of Deposit/9. Accidental deposit.

9. Accidental deposit.

An accidental deposit is made where a chattel, through circumstances over which neither the owner nor the recipient has any immediate control, is deposited on the land or premises of another. Examples are timber carried by the tide in a navigable river and left at low water on the towing path¹, fruit dropped on a neighbour's garden, or a tree which has fallen on the field of an adjacent proprietor. In such cases, so long as the involuntary depositary does no overt act to the chattel thus deposited on his land, he incurs no responsibility to the true owner in respect of it. But if he interferes with it an implied bailment is created, with all its obligations and responsibilities; and if he not only interferes with it, but uses it for his own purposes, this user amounts to a conversion, especially if the misuse is intentional².

1 *Nicholson v Chapman* (1793) 2 Hy Bl 254 at 257 per Eyre CJ (a person who voluntarily retrieves timber deposited on a river bank has no lien for his expenses in retrieving it, and is liable in conversion if he does not deliver it up to the owner on demand). But it is doubtful whether the finder would succeed in a claim for his expenses on a quantum meruit: see para 11 post; cf *Lampleigh v Brathwait* (1615) Hob 105; and see also *CONTRACT*. Cf *Binstead v Buck* (1776) 2 Wm Bl 1117.

2 *Mulgrave v Ogden* (1591) Cro Eliz 219; *Isaack v Clark* (1615) 2 Bulst 306. See also *Mills v Brooker* [1919] 1 KB 555 (fruit from lopped branch of overhanging tree). As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq and as to involuntary and unwitting bailees see TORT vol 45(2) (Reissue) paras 606-607.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(i) Meaning and Categories of Deposit/10. Involuntary deposit.

10. Involuntary deposit.

Where a chattel is sent, without request or arrangement, by one person to another who does not hold himself out as willing to receive it, the person to whom it is sent is under no liability to the sender for its safe custody or protection¹, but must not use it or otherwise convert it to his own use². Where unsolicited³ goods are sent⁴ to a person ('the recipient') with a view to his acquiring⁵ them, the recipient has no reasonable cause to believe that they were sent with a view to their being acquired for the purposes of a business and the recipient has neither agreed to acquire nor agreed to return them, the recipient may, as between himself and the sender⁶, use, deal with or dispose of the goods as if they were an unconditional gift to him and the rights of the sender to the goods are extinguished⁷.

Conversely, it has been suggested that where a man without previous request from the owner offers to take charge of a chattel, such an offer constitutes an inducement to the bailor to part

with the possession of the chattel, and binds the bailee to exercise special care in its custody⁸, but English law does not appear to recognise this refinement⁹.

1 *Howard v Harris* (1884) 1 Cab & El 253 (plaintiff author, being asked by the defendant, the lessee of a theatre, to send him a synopsis of his play, sent the whole manuscript, which the defendant lost; it was held that no duty of any kind was cast on the defendant by sending him something he had not asked for: see per Williams J at 254). This decision accords with that in *Lethbridge v Phillips* (1819) 2 Stark 544 (where a picture was, without the defendant's knowledge or request, sent to the defendant's house, and was there injured). Cf *Neuwith v Over Darwen Industrial Co-operative Society* (1894) 63 LJQB 290; *Scotland v Solomon* [2002] EWHC 1886 (Ch), [2002] All ER (D) 71 (Sep); and see *City Television v Conference and Training Office Ltd* [2001] EWCA Civ 1770 (a fraudster hired four plasma screens and ancillary equipment from the claimants to be delivered to the defendants' premises apparently for an international conference, the fraudster cancelled the conference at the last moment telling the defendants by telephone that deliverymen would be coming to collect the equipment and when they arrived the defendants telephoned the fraudster (but not the claimants) to confirm that the equipment could go: the equipment was never seen again; it was held that the fraudster could not be said even ostensibly to be the bailor and any duty of care had to be owed by the defendants to the claimants, and clearly such duty had been breached). A slight assumption of control, however, may make the person a depositary: see *Newman v Bourne and Hollingsworth* (1915) 31 TLR 209. Even so, if without negligence and acting reasonably he does something to the goods, for example, delivers them to a person falsely representing himself to be the owner, which results in the loss of the property, he will not be liable: *Elvin and Powell Ltd v Plummer, Roddis Ltd* (1933) 50 TLR 158: see also *Motis Exports Ltd v Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep 211, [2000] 1 All ER (Comm) 91, CA (see also Rix J at [1999] 1 Lloyd's Rep 837, [1999] 1 All ER (Comm) 571, QB). In *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561 the principle in *Elvin and Powell Ltd v Plummer, Roddis Ltd* supra was distinguished.

2 This seems to follow on principle: compare the cases cited in para 9 note 2 ante. See also the analogous principles governing the buyer's acceptance of goods not in accordance with the contract, as to which see *Grimoldby v Wells* (1875) LR 10 CP 391; *Harnor v Groves* (1855) 15 CB 667; *Chapman v Morton* (1843) 11 M & W 534, now embodied in the Sale of Goods Act 1979 s 35 (as amended) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 196 et seq).

3 'Unsolicited' means, in relation to goods sent or services supplied to any person, that they are sent or supplied without any prior request made by or on behalf of the recipient: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(6).

4 'Send' includes deliver: *ibid* reg 24(6).

5 'Acquire' includes hire: *ibid* reg 24(6).

6 'Sender', in relation to any goods, includes: (1) any person on whose behalf or with whose consent the goods are sent; (2) any other person claiming through or under the sender or any person mentioned in head (1) supra; and (3) any person who delivers the goods: *ibid* reg 24(6).

7 *Ibid* reg 24(1)-(3). A person who, not having reasonable cause to believe there is a right to payment, in the course of any business makes a demand for payment, or asserts a present or prospective right to payment, for what he knows are: (1) unsolicited goods sent to another person with a view to his acquiring them for purposes other than those of his business; or (2) unsolicited services supplied to another person for purposes other than those of his business, is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale: reg 24(4). A person who, not having reasonable cause to believe there is a right to payment, in the course of any business and with a view to obtaining payment for what he knows are unsolicited goods sent or services supplied as mentioned in reg 24(4): (a) threatens to bring any legal proceedings; or (b) places or causes to be placed the name of any person on a list of defaulters or debtors or threatens to do so; or (c) invokes or causes to be invoked any other collection procedure or threatens to do so, is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 5 on the standard scale: reg 24(5). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Powers of Criminal Courts (Sentencing) Act 2000 s 128 (as amended; prospectively repealed); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

For the purposes of the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24, an invoice or similar document which states the amount of a payment, and fails to comply with the applicable requirements of regulations made under the Unsolicited Goods and Services Act 1971 s 3A (as added) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 657 et seq) or, as the case may be, the Unsolicited

Goods and Services (Northern Ireland) Order 1976, SI 1976/57, art 6, is to be regarded as asserting a right to the payment: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(7). The Unsolicited Goods and Services Act 1971 s 3A (as added) applies for the purposes of the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24 in its application to England, Wales and Scotland as it applies for the purposes of the Unsolicited Goods and Services Act 1971: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(8). The Unsolicited Goods and Services (Northern Ireland) Order 1976, SI 1976/57, art 6 applies for the purposes of the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24 in its application to Northern Ireland as it applies for the purposes of the Unsolicited Goods and Services (Northern Ireland) Order 1976, SI 1976/57: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(9). Regulation 24 applies only to goods sent and services supplied after 31 October 2000: regs 1(1), 24(10). See generally SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 657 et seq.

8 Jones on Bailments (4th Edn, 1833) pp 47, 121, following Pothier and the Roman lawyers.

9 Story on Bailments (9th Edn, 1878) s 82.

UPDATE

10-12 Involuntary deposit ... Finding by bailee or purchaser

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

10 Involuntary deposit

NOTE 7--SI 2000/2334 reg 24(4), (5), (7)-(9) revoked: SI 2008/1277.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(ii) Finding of Chattels/11. Bailment by finding.

(ii) Finding of Chattels

11. Bailment by finding.

Where a lost chattel is found in a public place¹, the finder² is under no obligation to take charge of it at all. However, an occupier of land may owe an obligation to search for chattels which are lost upon his land, and to take them into custody⁴. If, moreover, the finder actually takes a lost chattel into his custody, he constitutes himself a depositary, and assumes the obligations of a depositary to the true owner⁵, including the obligations to take reasonable steps to locate the owner and acquaint him with the finding and the present whereabouts of the chattel⁶, to exercise due care for the safety of the chattel⁷ until its return to the owner and to return it to him on demand⁸. Further, the finder cannot claim a lien on the chattel for any expense to which he may have been put in keeping or preserving it⁹. Unless the true owner has intentionally abandoned the chattel¹⁰, his title to it is not lost and he may recover the chattel, provided that his right to bring a claim has not become barred by lapse of time, from any one in whose hands it may be found¹¹. The possession of the finder, however, is rightful and continues rightful until the owner demands the return of the chattel, and by taking the chattel into his custody he does no wrong to the true owner, unless he dishonestly appropriates it at any time with the intention of permanently depriving the owner of it, in which case the taking may be a trespass¹² and the finder is guilty of theft¹³.

1 For provisions for the disposal of articles left in public conveyances, etc see AIR LAW; RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES; ROAD TRAFFIC. Cf the Police (Property) Act 1897; and POLICE vol 36(1) (2007 Reissue) paras 520-522. For provisions as to the disposal of abandoned vehicles see the Road Traffic Regulation Act 1984 s 101 (as amended); and ROAD TRAFFIC vol 40(2) (2007 Reissue) para 871. No provision, however, is made for the common case of property being found in the street and taken to the police; presumably the finder in taking it to the police is fully discharging his duty and will not be liable to the owner whatever the police may do: see *Hollins v Fowler* (1875) LR 7 HL 757 at 766 per Blackburn J. Cf YB 27 Hen 8, fo 13, pl 35: 'If a man comes into possession by a bailment, then he is answerable by virtue of the bailment and if he bails the goods over or they are taken from his possession, still he is answerable to the bailor by virtue of the bailment. But otherwise if a man comes by goods by finding, for he is only answerable by reason of his possession and if, without wrongful act, he is out of possession before he who has the right has brought his action he is not answerable.' See also *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561, where an auction house that received a stolen Dutch master painting (registered with a professional register of stolen art) from someone other than the person from whom they were stolen, and redelivered the work to the deliveror when it was unsold, was held not liable in conversion provided that that it had acted in good faith and without notice or knowledge of any adverse claim to the work; the auction house was also held to owe no duty as a bailee, as a person akin to a finder, or as an involuntary or 'unconscious' bailee to verify the deliveror's title before redelivering to him. As to chattels found on private property see para 14 post. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq; as to involuntary and unwitting bailees see TORT vol 45(2) (Reissue) paras 606-607; and as to conversion and the police see TORT vol 45(2) (Reissue) para 609.

2 To call the finder a bailee would not be etymologically accurate in all cases, because the word 'bailee' is derived from the French *bailier*, to deliver or hand over, and there is no delivery or handing over to the finder: see *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825 at 831, [1970] 1 WLR 1262 at 1268, PC. In the English courts the word 'bailment' has, however, acquired a meaning wide enough to include cases of 'bailment by finding' and cases of sub-bailment (as to which see para 41 post) where there is no contractual relationship between bailor and bailee or sub-bailee respectively: see *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* supra at 832 and 1270; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 732, [1965] 2 All ER 725 at 734, CA, per Diplock LJ; *Southland Hospital Board v Perkins Estate* [1986] 1 NZLR 373 at 375 per Cook J (obiter); *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 405, CA, per Bingham LJ. See also *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.

3 *Kowal v Ellis* (1977) 76 DLR (3d) 546 at 547 per O'Sullivan JA.

4 *Parker v British Airways Board* [1982] QB 1004 at 1018, [1982] 1 All ER 834 at 843, CA, per Donaldson LJ (obiter).

5 *Isaack v Clark* (1615) 2 Bulst 306 at 312 per Coke CJ; *Newman v Bourne and Hollingworth* (1915) 31 TLR 209 (master held liable for servant's lack of care); *Parker v British Airways Board* [1982] QB 1004 at 1018, [1982] 1 All ER 834 at 843, CA, per Donaldson LJ (obiter). Cf Story on Bailments (9th Edn, 1878) ss 85-87, criticising the view expressed in *Bac Abr Bailment D*. See also *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561.

6 *Parker v British Airways Board* [1982] QB 1004 at 1018, [1982] 1 All ER 834 at 843, CA, per Donaldson LJ (obiter).

7 As in ordinary bailment the obligation arises because in the circumstances the taking of possession involves an assumption of responsibility for the chattel's safe keeping: see *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825, [1970] 1 WLR 1262, PC; and para 1 note 4 ante.

8 See para 85 post.

9 *Binstead v Buck* (1776) 2 Wm Bl 1117. It seems that he has no claim for compensation in any form: see para 9 note 1 ante; *Kowal v Ellis* (1977) 76 DLR (3d) 546 at 547-548 per O'Sullivan JA. But cf *China-Pacific SA v Food Corp of India* [1982] AC 939, [1981] 3 All ER 688, HL.

10 'If one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But... if he loses or drops it by accident, it cannot be collected from thence that he designed to quit the possession, and therefore in such case the property still remains in the loser, who may claim it again of the finder': 2 Bl Com 9.

11 *Clayton v Le Roy* [1911] 2 KB 1031 at 1048, CA, per Fletcher Moulton LJ. The observations in this and other cases, such as *Miller v Dell* [1891] 1 QB 468, CA, must be read subject to the Limitation Act 1980 ss 3, 32 (as amended): see para 87 post; and LIMITATION PERIODS vol 68 (2008) PARAS 940, 942, 948, 983 et seq, 1220 et seq. There used also to be an exception to this if the chattel was sold in market overt; however, the doctrine of sales in market overt (which was contained in the Sale of Goods Act 1979 s 22(1)) was abolished by the Sale of

Goods (Amendment) Act 1994 s 1: see MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) para 1026; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 23. See also para 88 note 13 post.

12 *Merry v Green* (1841) 7 M & W 623, where a person purchased, at a public auction, a bureau, in a secret drawer of which he later found money, which he appropriated to his own use. At the time of the sale neither the buyer nor the seller knew that the bureau contained anything, and Parke B said, at 631, that, though there was a delivery of the bureau, and a lawful property in it thereby vested in the finder, there was no delivery so as to give a lawful possession of the money. It was therefore a simple case of finding, and the property in the money remained in the seller. See also para 12 post. See Palmer in Meisel (ed) *Property and Protection*, Essays in Honour of Brian Harvey (2000) ch 1, especially p 13 note 80.

13 See the Theft Act 1968 ss 1-6; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 282 et seq. Where a finder comes into possession of a chattel as a result of his trespassing upon another's land, the finder may acquire no rights in the chattel as against the occupier, even where the occupier had no possession of the chattel immediately prior to the trespass: *Parker v British Airways Board* [1982] QB 1004 at 1009, [1982] 1 All ER 834 at 837, CA, per Donaldson LJ (obiter).

UPDATE

10-12 Involuntary deposit ... Finding by bailee or purchaser

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(ii) Finding of Chattels/12. Finding by bailee or purchaser.

12. Finding by bailee or purchaser.

If a bailee entrusted with a chattel for a specific purpose, such as its repair or alteration, finds concealed in it some property, that property belongs to the owner of the chattel and not to the bailee, and if the bailee commits some act in regard to property not warranted by the purpose for which the chattel was delivered to him, that unwarranted act amounts to a conversion at least and may amount to theft¹.

So, if a person purchases a chattel, such as a bureau, and subsequently finds concealed in it some article the existence of which was unknown to both buyer and seller at the time of the purchase, the property in that article will, apart from special circumstances such as the proved intention of the parties to sell and buy the chattel and its contents, known and unknown, remain in the seller² and will not pass to the buyer, who will become a mere depositary of the article, and may be guilty of theft if he appropriates it to himself although, as regards criminal liability, an important factor in determining the question is the honest belief of the purchaser as to what was to be conveyed to him at the time of the purchase³.

1 *Cartwright v Green* (1803) 8 Ves 405 at 409 per Lord Eldon. See also the Theft Act 1968 ss 2, 3; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 283 et seq. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq.

2 This statement was approved in *Thomas v Greenslade* (1954) Times, 6 November. See also para 11 note 12 ante. See Palmer in Meisel (ed) *Property and Protection*, Essays in Honour of Brian Harvey (2000) ch 1, especially p 13 note 80.

3 See the Theft Act 1968 s 2.

UPDATE

10-12 Involuntary deposit ... Finding by bailee or purchaser

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(ii) Finding of Chattels/13. Finder's rights against third parties.

13. Finder's rights against third parties.

Subject to the special position of chattels found on private property¹, as against everyone save the true owner or the finder's master or principal², the property in a chattel found vests in the finder on his taking possession of it³, and thereafter, as a party voluntarily in possession⁴ of that chattel, he has many of the rights and obligations which belong to a bailee, including a duty of care towards the owner. Consistently with this position, he can generally maintain a claim against any person (except the true owner, or his agent) who may dispossess him of it, either by taking it out of his possession or by converting it to his own use after receiving it from him, and recover the full value of the article if he sues in trover⁵. The wrongdoer cannot defend himself by showing that the real title was in some third person⁶ unless he invokes the statutory machinery whereby a defendant in a claim for wrongful interference with goods can show that someone other than the claimant has a better title to the goods⁷. If the value cannot be established without the production of the article, and the wrongdoer fails to produce it, it may be presumed against him that the article was of the finest quality of its kind and its value may be assessed on that basis⁸ in accordance with the principle that all things are presumed against a wrongdoer⁹.

1 See para 14 post.

2 A person who, as a servant, finds a thing in the course of his employment finds it for his master or principal: *South Staffordshire Water Co v Sharman* [1896] 2 QB 44, DC, as explained in *Hannah v Peel* [1945] KB 509 at 519, [1945] 2 All ER 288 at 293; *Parker v British Airways Board* [1982] QB 1004 at 1017, [1982] 1 All ER 834 at 843, CA, per Donaldson LJ (obiter). See also *Byrne v Hoare* [1965] Qd R 135.

3 However, chattels found in the sea, whether jetsam (sunk under water), flotsam (afloat on the surface of the water) or ligan (sunk under water but tied to a buoy), or chattels cast ashore by shipwreck, belong to the Crown if the true owner fails to appear, unless the right to them has been granted to a subject: 1 BI Com 290-292. The same principle applies to the finding of whales or sturgeon (which are royal fish), whether in the sea or cast ashore: 1 BI Com 290. See further CROWN PROPERTY vol 12(1) (Reissue) paras 271-272. For another qualification to the principle (ie that property in a chattel found vests in the finder on his taking possession of it) see *Waverley Borough Council v Fletcher* [1996] QB 334, [1995] 4 All ER 756, CA (a plaintiff local authority owning a public park was held to have a superior right to a valuable brooch over the defendant, who using a metal detector had discovered the brooch; the local authority being entitled to possess goods found on its property against all but the rightful owner, the court adding that metal detecting was not a recreation of the sort permitted under the terms under which the authority held the land on behalf of the general public). See also para 14 post.

4 See para 89 post.

5 *Jeffries v Great Western Rly Co* (1856) 5 E & B 802 at 807 per Crompton J; *Armory v Delamirie* (1722) 1 Stra 505; and see notes thereon in 1 Smith LC (13th Edn) 393. As to the right to sue in trover, which is the form of claim for conversion, see TORT vol 45(2) (Reissue) para 542 et seq. It is possible that a finder who assumes possession of the chattel by virtue of an act of trespass against an occupier on whose land the goods were situated at the time of the trespass obtains no title against that occupier, irrespective of whether the occupier had a prior possession: *Parker v British Airways Board* [1982] QB 1004 at 1009-1010, 1017, [1982] 1 All ER 834 at 837, 843, CA, per Donaldson LJ (obiter). However, even an unlawfully acquired possession can confer sufficient title to enable the possessor to sue a third party interloper, that is someone other than the true owner

or a landowner from whose land the chattel was taken by trespass: *Parker v British Airways Board* [1982] QB 1004, [1982] 1 All ER 834, CA.

6 *Jeffries v Great Western Rly Co* (1856) 5 E & B 802 at 805 per Lord Campbell CJ. But see paras 85, 88-89 post.

7 See the Torts (Interference with Goods) Act 1977 s 8; paras 82, 84, 89 post; and TORT vol 45(2) (Reissue) para 560 et seq. For procedural rules concerning parties in claims for wrongful interference with goods, and the power of the court to order, in certain circumstances, that certain persons be deprived of the right to bring a claim against the defendant, see CPR 19.5A; and CIVIL PROCEDURE.

8 *Mortimer v Cradock* (1843) 12 LJCP 166 at 167 per Tindal CJ; *Armory v Delamirie* (1722) 1 Stra 505.

9 *le omnia praesumuntur contra spoliatores*: this embodies the grounds of the decision in *Armory v Delamirie* (1722) 1 Stra 505. See also *Indian Oil Corp Ltd v Greenstone Shipping SA, The Ypatianna* [1988] QB 345, [1987] 3 All ER 893. As to cases where the maxim shifts the onus of proof see *Williamson v Rover Cycle Co* [1901] 2 IR 189 at 202; affd [1901] 2 IR 615. See also *Malhotra v Dhawan* [1997] 8 Med LR 319, CA; *Colbeck v Diamanta (UK) Ltd* [2002] EWHC 616, [2002] All ER (D) 336 (Feb), QB.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(ii) Finding of Chattels/14. Chattels found on private property.

14. Chattels found on private property.

So far as relates to chattels (other than treasure¹, waifs² and estrays³) found on private property, the possession of land carries with it, in general, possession of everything which is attached to or under that land and, in the absence of a better title elsewhere, the right to possess it⁴. Consequently, if a chattel is found on land by some person other than the owner of the land, that owner, though previously unaware of its existence, and not the finder is, except as against the owner of the chattel, entitled to it⁵.

The difficulty arises where the chattel is lying unattached on the surface of the land. If the property on which it is found is an inn, the innkeeper may be entitled to it, for he is said to enjoy a special property in the goods of his guests⁶. If the landowner's servant or agent finds it in the course of his employment or agency, the landowner is entitled to it; the landowner may also be entitled when the finder has committed a trespass⁷. But a landowner does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else⁸. To establish possession in such circumstances, the landowner must demonstrate a manifest intention to exercise exclusive control over anything which might be on the premises⁹.

1 *le* formerly 'treasure trove', which was gold or silver of unknown ownership found concealed in a private place. For the meaning of 'treasure' see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1086. As to treasure generally see the Treasure Act 1996; and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1084 et seq. See also CROWN PROPERTY vol 12(1) (Reissue) para 373.

2 *le* goods stolen and thrown away by the thief in his flight: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 369; CROWN PROPERTY vol 12(1) (Reissue) para 371.

3 *le* animals of unknown ownership found wandering in a manor or lordship: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 369; CROWN PROPERTY vol 12(1) (Reissue) para 372.

4 *Parker v British Airways Board* [1982] QB 1004, [1982] 1 All ER 834, CA; *South Staffordshire Water Co v Sharman* [1896] 2 QB 44 at 46, DC, quoting with approval Pollock and Wright's Possession in the Common Law p 41. See also *Hannah v Peel* [1945] KB 509 at 520, [1945] 2 All ER 288 at 293-294; *Re Cohen, National Provincial Bank Ltd v Katz* [1953] Ch 88, [1953] 1 All ER 378.

5 *South Staffordshire Water Co v Sharman* [1896] 2 QB 44, DC. Where the property on which the chattels are found is in the occupation of a lessee, they belong to the lessor, not the lessee, if they were there when the

lease was granted, unless the terms of the lease are wide enough to cover them: *Elwes v Brigg Gas Co* (1886) 33 ChD 562. But if they were not then on the property they would seem to belong to the lessee on the principle laid down in *South Staffordshire Water Co v Sharman* supra. See also *London Corpn v Appleyard* [1963] 2 All ER 834, [1963] 1 WLR 982 (lessee entitled as against finder, but lessor entitled as against lessee under special provision in lease). See also *Waverley Borough Council v Fletcher* [1996] QB 334, [1995] 4 All ER 756, CA (owner of public park held to have superior right to valuable brooch found there over the finder); and para 13 note 3 ante.

6 *Bridges v Hawkesworth* (1851) 21 LJQB 75 at 76 per Patteson J. As to innkeepers see LICENSING AND GAMBLING vol 67 (2008) PARA 183 et seq.

7 *Hannah v Peel* [1945] KB 509 at 519-520, [1945] 2 All ER 288 at 293-294; and see paras 11, 13 ante. Cf *Hibbert v McKiernan* [1948] 2 KB 142, [1948] 1 All ER 860, DC (where a man trespassed on the property of a golf club and took a ball which he found on the links and was held guilty of larceny).

8 *Parker v British Airways Board* [1982] QB 1004 at 1009, [1982] 1 All ER 834 at 837, CA, per Donaldson LJ (obiter); *Hannah v Peel* [1945] KB 509 at 520, [1945] 2 All ER 288 at 294; *Kowal v Ellis* (1977) 76 DLR (3d) 546.

9 *Parker v British Airways Board* [1982] QB 1004, [1982] 1 All ER 834, CA; *Kowal v Ellis* (1977) 76 DLR (3d) 546. Thus where an airline passenger found a bracelet on the floor of an executive lounge at Heathrow Airport, the passenger and not the British Airways Board was held entitled to possession (see *Parker v British Airways Board* supra); where a customer found on the floor of a shop a packet of banknotes accidentally dropped by a stranger who could not be traced, the finder, not the shopkeeper, was held entitled to possession (see *Bridges v Hawkesworth* (1851) 21 LJQB 75, which has been much discussed by distinguished commentators, some of whom have supported it for reasons which differ from each other and from the reasons given by the court which decided it, while one at least has suggested that it was wrongly decided (see *Hannah v Peel* [1945] KB 509 at 515-517, [1945] 2 All ER 288 at 291-292); but the decision in *Bridges v Hawkesworth* supra was upheld and explained in *Parker v British Airways Board* supra); and where a soldier found a brooch in a house which had been requisitioned from the owner, who had never occupied the house himself, the finder, not the owner of the house, was held entitled to possession of the brooch (see *Hannah v Peel* [1945] KB 509, [1945] 2 All ER 288). See further PERSONAL PROPERTY vol 35 (Reissue) paras 1211, 1220.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(iii) Bailee's Obligations/15. Measure of diligence.

(iii) Bailee's Obligations

15. Measure of diligence.

In order that a claim may be maintained in the case of a gratuitous deposit the defendant must have been guilty of fraud¹, breach of orders, or negligence². In negligence the standard of care required of a gratuitous bailee is that demanded by the circumstances of the particular case³: thus the measure of diligence demanded of a gratuitous depository is as a rule that degree of diligence which men of common prudence generally exercise about their own affairs⁴, but if the bailee is notoriously dissipated, negligent or imprudent, and the bailor was aware of the fact, a presumption might perhaps be raised that the bailor expected of him only such amount of care as the bailee was in the habit of bestowing on his own chattels of a similar nature⁵. The fact that the bailee keeps chattels deposited with him in the same manner as he keeps his own may be, but is not necessarily, sufficient to exempt a gratuitous bailee from liability⁶.

The amount of diligence which is required may also be affected by the particular locality in which the bailment is effected. Thus in agricultural districts it may be usual to leave barns, in which horses and other cattle are kept, unlocked at night; but in cities a corresponding practice would be deemed a great want of caution⁷.

In each case it has to be decided whether, having regard to any exempting conditions⁸ and all the circumstances of the particular case⁹, including the nature, portability, value and character of the chattel, there has been a breach of duty on the bailee's part to justify a finding of negligence¹⁰. The fact that the chattel was lost or injured whilst in the bailee's possession raises

prima facie a presumption against him¹¹, but he may rebut it by proving that he was not to blame for the loss or injury, even if he is unable to show how it happened¹².

Except by special agreement, a gratuitous depositary is not liable to his bailor for the misfeasances of third parties whereby the chattel bailed is damaged or stolen, unless it can be shown that he was guilty of negligence of a sufficiently culpable kind in its control or custody, or of fraud¹³.

The bailee must return the chattel bailed to the bailor on demand¹⁴.

1 *Moore v Mourgue* (1776) 2 Cowp 479 at 480 per Lord Mansfield CJ.

2 The term 'gross negligence' adds nothing and has been disapproved: see *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 697-698, [1962] 2 All ER 159 at 160-161, CA; and para 3 ante. See also *Khan v Grocutt* [2002] EWCA Civ 1945, [2003] RTR 314, [2003] Lloyd's Rep IR 464 (where the defendant was a gratuitous bailee of important insurance documents which he failed to take reasonable steps to preserve and reproduce when needed).

3 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 698, [1962] 2 All ER 159 at 161, CA, per Ormerod LJ. The views expressed in older cases that the standard of care was to be adjudged according to rules peculiar to bailment are not now consistent with the modern law of negligence and these cases must now be read in the light of *Houghland v RR Low (Luxury Coaches) Ltd* supra and later authority: see note 4 infra. As to the degree of care and diligence required in different kinds of bailment see para 3 ante.

4 *China-Pacific SA v Food Corpn of India, The Winson* [1982] AC 939 at 960, [1981] 3 All ER 688 at 694, HL, per Lord Diplock; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 at 589, [1978] 3 All ER 337 at 339, PC. See also *Giblin v McMullen* (1868) LR 2 PC 317; *Bullen v Swan Electric Engraving Co* (1907) 23 TLR 258, CA; *Blount v War Office* [1953] 1 All ER 1071, [1953] 1 WLR 736; and para 17 post. In several modern authorities, the duty is simply stated as one of reasonable care in all the circumstances: *Garlick v W & H Rycroft Ltd* [1982] CA Transcript 277; *Mitchell v Ealing London Borough Council* [1979] QB 1 at 6, [1978] 2 All ER 779 at 781 per O'Connor J; and see *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 526, [1963] 2 All ER 575 at 608, HL, per Lord Devlin.

5 *The William* (1806) 6 Ch Rob 316. See also *Coggs v Bernard* (1703) 2 Ld Raym 909 at 914 per Holt CJ.

6 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 914 per Holt CJ; *Giblin v McMullen* (1868) LR 2 PC 317 at 339 per Lord Chelmsford. Cf *Doorman v Jenkins* (1834) 2 Ad & El 256, where the defendant coffee-house keeper accepted from the plaintiff the deposit of a sum with which to take up a bill which would be presented there for payment, and placed it with money of his own to a larger amount in a cash-box which he kept in the taproom, whence it was stolen on a day on which the room was open to the public while the rest of the house was closed; Lord Denman CJ at 258 said that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own. This was approved in *Giblin v McMullen* supra at 339. See also *Nelson v Macintosh* (1816) 1 Stark 237; *Dartnall v Howard and Gibbs* (1825) 4 B & C 345; *Garlick v W & H Rycroft Ltd* [1982] CA Transcript 277.

7 Story on Bailments (9th Edn, 1878) s 13.

8 See paras 16, 40 post.

9 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA. See also *Garlick v W & H Rycroft Ltd* [1982] CA Transcript 277.

10 *Giblin v McMullen* (1868) LR 2 PC 317. See also *Ryder v Wombwell* (1868) LR 4 Exch 32 at 38-39.

11 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA.

12 The onus is always on the bailee, whether a bailee for reward or a gratuitous bailee, to prove that the loss of goods bailed to him was not caused by his negligence: *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779. See *Wiehe v Dennis Bros* (1913) 29 TLR 250; *Ludgate v Lovett* [1969] 2 All ER 1275 at 1277, [1969] 1 WLR 1016 at 1019, CA, per Harman LJ; *Walsh v Holst & Co Ltd* [1958] 3 All ER 33 at 37, [1958] 1 WLR 800 at 805, CA, per Hodson LJ. See also *Toor v Bassi* [1999] EGCS 9, CA (gratuitous bailee unable to rebut presumption of failing to deal reasonably with an unequivocal demand made by the owner for the return of the goods). See also paras 6 note 10 ante, 43 post. As to the burden of proof with regard to deviation by a gratuitous bailee, see

Mitchell v Ealing London Borough Council [1978] QB 1, [1978] 2 All ER 779; cf *Jerry Juhan Developments SA v Avon Tyres Ltd* (1999) Times, 25 January per Evans-Lombe J; and see generally para 6 ante.

13 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 913; *Nelson v Macintosh* (1816) 1 Stark 237 at 238; *Giblin v McMullen* (1868) LR 2 PC 317; Jones on Bailments (4th Edn, 1833) pp 46-47.

14 See *Cranch v White* (1835) 1 Bing NC 414 at 420; *Wetherman v London and Liverpool Bank of Commerce Ltd* (1914) 31 TLR 20; *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582 at 611, [1952] 1 All ER 572 at 585, HL; and para 85 post. It appears, however, that the demand must allow a reasonable time for compliance. As to whether the bailor is bound by a promise, made at or before the time of delivery to the bailee, not to call for the return of the goods before a particular time, see Palmer *Bailment* (2nd Edn, 1991) p 583 (such promises potentially enforceable by reason of reciprocal consideration); cf Paton *Bailment in the Common Law* (1952) p 101. As to whether the bailor owes an obligation to collect the goods within a particular time, see Palmer *Bailment* (2nd Edn, 1991) pp 592-593.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(iii) Bailee's Obligations/16. Liability limited or enlarged by special agreement.

16. Liability limited or enlarged by special agreement.

A gratuitous bailee may, by special agreement, limit or exclude his liability for any loss of, or damage to, the chattel¹. His liability then depends upon the terms of the agreement², subject to any statutory controls imposed upon the disclaimer³. It is immaterial for this purpose whether the special agreement is oral or in writing⁴.

Although the relationship of depositor and depositary is not, because of the lack of consideration moving from the depositor, contractual⁵, it appears that the depositary can also enlarge his liability to the depositor by special agreement⁶. Consequently, if the bailee, in assuming possession of the chattel, expressly undertakes to keep it safely, he enlarges the measure of his responsibility, and by virtue of his special agreement may even make himself an insurer of it⁷. Similarly, a gratuitous bailee who undertakes to return the goods only to a particular person, or only upon particular conditions, will be answerable for the breach of that special undertaking⁸. Again, it appears immaterial for this purpose whether the special agreement is oral or in writing⁹. Yet such a bailee's responsibility is limited in some respects, for though his undertaking to keep the chattel safely binds him to keep it safely against all parties and to answer for accidents or theft¹⁰, he will not be liable in the case of casualties happening by an act of God, or by the Queen's enemies¹¹.

Where a gratuitous bailee by way of deposit undertakes to redeliver the goods to the bailor at a particular time or place, and fails to discharge that undertaking, the bailee becomes an insurer of the goods and is strictly liable for any subsequent loss or damage¹². However, the making of a second appointment with the bailor may cause the bailee's responsibility for the goods to revert to a duty of reasonable care¹³. This will not, however, relieve the bailee from his strict responsibility for misadventures occurring to the goods before the making of that second appointment¹⁴. Further, where the goods are damaged or lost at some time after the bailee's failure to meet the original appointment, and the bailee has since made a second appointment, the burden rests on the bailee to show that the misadventure occurred after the making of the second appointment and thus after his responsibility has reverted to that of an ordinary bailee¹⁵.

1 *Brown v National Bank of Australasia* (1890) 16 VLR 475; Palmer *Bailment* (2nd Edn, 1991) pp 577-578.

2 *Treffitz v Canelli* (1872) LR 4 PC 277 at 281; *Kettle v Bromsall* (1738) Willes 118 at 121; *Orchard v Connaught Club* (1930) 46 TLR 214. See also *Kay v Shuman* (1954) Times, 22 June; and para 40 note 1 post. It

may be argued that this special agreement constitutes a contract, the depositor's consideration being his relieving the depositary from the normal duty of reasonable care owed by an unrewarded bailee; *sed quaere*.

3 The exclusion or restriction of liability for negligence is now subject to the provisions of the Unfair Contract Terms Act 1977: see CONTRACT vol 9(1) (Reissue) para 820 et seq. See also paras 40-41 post.

4 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 915.

5 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 731-732, [1965] 2 All ER 725 at 734-735, CA, per Diplock LJ (obiter); *Thomas v High* (1960) SRNSW 401; *Parastatidis v Kotaridis* [1978] VR 449 at 454-455 per Harris J (obiter); but cf *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 167, [1974] 1 All ER 1015 at 1019, PC. See also *East West Corpn v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *Sandeman Coprimar SA v Transitos y Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, [2003] 2 Lloyd's Rep 172.

6 *Kettle v Bromsall* (1738) Willes 118.

7 *Kettle v Bromsall* (1738) Willes 118.

8 *Trefftz v Canelli* (1872) LR 4 PC 277 at 281; but cf *Parastatidis v Kotaridis* [1978] VR 449.

9 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 915.

10 *Kettle v Bromsall* (1738) Willes 118.

11 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 918.

12 *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779.

13 *Mitchell v Ealing London Borough Council* [1979] QB 1 at 9, [1978] 2 All ER 779 at 784 per O'Connor J.

14 See note 13 supra.

15 See note 13 supra.

UPDATE

16 Liability limited or enlarged by special agreement

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(iii) Bailee's Obligations/17. Deposits with bankers or traders.

17. Deposits with bankers or traders.

Where a customer leaves valuables with his bankers¹ for safe custody, or allows a printer or any other trader to retain his plates or chattels upon which the trader may have worked, it is not always easy to say whether the bailment is gratuitous² or one for reward to the bailee³. Even if no specific charge for keeping is made, it may well be that the custodian indirectly obtains some consideration for the service, either in being allowed to continue to keep the customer's account⁴, or in the prospect of future work⁵. On balance, it seems that such depositaries should be characterised as bailees for reward⁶.

1 In *Giblin v McMullen* (1868) LR 2 PC 317, bankers with whom the plaintiff's testator had deposited for safe custody a box (of which he kept the key) containing debentures were found to be gratuitous bailees, whereas in

Re United Service Co, Johnston's Claim (1871) 6 Ch App 212, bankers were held to be bailees for reward. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 860, 875.

2 *le depositum*: see para 2 ante.

3 *le locatio custodiae*: see para 2 ante.

4 *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 at 589, [1978] 3 All ER 337 at 340, PC (obiter). See also *Kahler v Midland Bank Ltd* [1948] 1 All ER 811 at 819-820, CA, per Scott LJ; on appeal, without reference to this point, [1950] AC 24, [1949] 2 All ER 621, HL.

5 *Bullen v Swan Electric Engraving Co* (1906) 22 TLR 275 at 277 per Walton J; affd (1907) 23 TLR 258, CA. See also PRESS, PRINTING AND PUBLISHING vol 36(2) (Reissue) para 408.

6 *Palmer Bailment* (2nd Edn, 1991) ch 8. Cf *Bullen v Swan Electric Engraving Co* (1906) 22 TLR 275 at 277 per Walton J (affd (1907) 23 TLR 258, CA); and see *Mitchell v Davis* (1920) 37 TLR 68.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(iii) Bailee's Obligations/18. Use of chattel precluded.

18. Use of chattel precluded.

The bailee is precluded from using the bailed chattel for his own personal advantage in any manner whatsoever without the bailor's consent, express or implied, unless such use is necessary for its preservation¹. Apart from such necessary use, if the bailee applies the chattel to any purpose other than that of bare custody he becomes responsible for any loss or damage resulting from his unlawful departure from the terms of the bailment², except where the cause of the loss or damage is independent of his acts and is inherent in the chattel itself³. The bailee's act in doing something inconsistent with the terms of the contract terminates his status as a bailee, and causes the possessory title to revert to the bailor, entitling him to maintain a claim of trover⁴.

This rule applies a fortiori when the bailee's unwarranted action results in either the destruction or permanent alteration in character of the thing bailed⁵.

If the chattel deposited is contained in a sealed or locked receptacle, the depositary has no right to open it, and it is a breach of the confidential relation on which this contract is based if he does so unnecessarily⁶; and it may be negligence to omit to take steps to see that the receptacle is not opened⁷.

1 *Bac Abr Bailment A*. See also *Re Tidd, Tidd v Overell* [1893] 3 Ch 154, where money was handed over to be taken care of, but with the intention that the bailee might use it; and North J held, at 156, that it was received, not as a loan, but as a trust for safe custody.

2 *Mitchell v Ealing London Borough Council* [1978] QB 1, [1978] 2 All ER 779; Pothier's *Contrat de Dépôt* ss 34, 35; *Palmer Bailment* (2nd Edn, 1991) ch 9.

3 *Lilley v Doubleday* (1881) 7 QBD 510 at 511 per Grove J (a case of bailment for reward). See further *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779, applying *Shaw & Co v Symmons & Sons Ltd* [1917] 1 KB 799 (failure to return bailed goods at the appointed time).

4 *Fenn v Bittleston* (1851) 7 Exch 152; *Plasycod Collieries Co Ltd v Partridge, Jones & Co Ltd* [1912] 2 KB 345 at 351 per Hamilton J; *R v Price* (1913) 9 Cr App Rep 15, CCA. The statement in the text was approved, as applying generally to bailments, in *North Central Wagon and Finance Co Ltd v Graham* [1950] 2 KB 7 at 15, [1950] 1 All ER 780 at 784, CA, per Cohen LJ; and see *Alexander v Railway Executive* [1951] 2 KB 882 at 887, [1951] 2 All ER 442 at 445 per Devlin J; *Reliance Car Facilities Ltd v Roding Motors* [1952] 2 QB 844 at 851, [1952] 1 All ER 1355 at 1358, CA, per Hodson LJ; *Union Transport Finance Ltd v British Car Auctions Ltd* [1978] 2 All ER 385, CA. As to trover or conversion (included in wrongful interference with goods) see TORT vol 45(2) (Reissue) para 542 et seq.

- 5 *Wilkinson v Verity* (1871) LR 6 CP 206.
- 6 Pothier's Contrat de Dépôt s 38. See also *R v Robson* (1861) Le & Ca 93.
- 7 See *Blount v War Office* [1953] 1 All ER 1071, [1953] 1 WLR 736.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(1) DEPOSIT/(iii) Bailee's Obligations/19. Consequence of breach of duty.

19. Consequence of breach of duty.

If a bailee deals with the chattels entrusted to him in a way not authorised by the bailor, he takes upon himself the risk of so doing.

If, therefore, the bailee without necessity, and without the bailor's permission, fails to keep the chattel entrusted to him in the place where he has undertaken to keep it, that is to say, in the absence of express agreement, in the place where he himself usually keeps his own chattels of a similar description, he becomes by reason of his breach of duty an insurer of the chattel, and is liable to the bailor for any loss or damage caused¹, unless he can show that the loss or damage did not arise out of his breach of duty, but must have taken place as inevitably at the one place as at the other². Similarly, a bailee by way of deposit who undertakes to redeliver the goods to the bailor at a particular time, and fails to do so, becomes thereafter an insurer of the goods³. The bailee's promise would appear to be enforceable irrespective of the absence of contract. If the bailee without necessity, and without the bailor's express or implied permission, sells the chattel, a claim for conversion will lie against him⁴.

A bailee is not free to divest himself of responsibility and substitute that of another without the bailor's consent⁵.

1 Pothier's Contrat de Dépôt s 38; Palmer *Bailment* (2nd Edn, 1991) pp 578-581; cf *Mytton v Cock* (1738) 2 Stra 1099; *Ronnenberg v Falkland Islands Co* (1864) 17 CBNS 1; *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779 (delay in redelivery).

2 *Lilley v Doubleday* (1881) 7 QBD 510 at 511 per Grove J; *Davis v Garrett* (1830) 6 Bing 716 at 724 per Tindal CJ (cases of bailment for reward). Cf *Coldman v Hill* [1919] 1 KB 443, CA; and see paras 25, 32 post.

3 *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779 (local authority, in possession of former tenant's goods as gratuitous bailee, made appointment for redelivery but failed to keep it; local authority held strictly liable for subsequent theft, notwithstanding reasonable care in custody of the goods). See *Shaw & Co v Symmons & Sons Ltd* [1917] 1 KB 799, a case of bailment for reward, on which O'Connor J relied in *Mitchell v Ealing London Borough Council* supra. See further para 18 ante.

4 *Sachs v Miklos* [1948] 2 KB 23 at 36, [1948] 1 All ER 67 at 68, CA; *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 983. As to agency of necessity see generally AGENCY vol 1 (2008) PARA 24. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq.

5 See *Blount v War Office* [1953] 1 All ER 1071, [1953] 1 WLR 736.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/20. Meaning of 'mandate'.

(2) MANDATE

20. Meaning of 'mandate'.

Mandate¹ is another species of bailment gratuitously undertaken by the bailee. It may be defined as a bailment of a specific chattel² in regard to which the bailee engages to do some act without reward³. It has much in common with deposit⁴, but whereas in the case of deposit the principal object of the contract is to provide for the safe custody of the thing, and any service or labour, such as feeding an animal or preserving a perishable article, is merely accessory, in the case of mandate the safe custody of the chattel deposited is ancillary to an undertaking by the bailee to do some act to it, or to perform some service in connection with it⁵. In this sense, therefore, it may be said that the great distinction between mandate and deposit is that the former lies in feasance and the latter in custody⁶.

In this form of bailment, the bailor's confidence in the capacity, skill and honour of the bailee duly to perform the task or employment undertaken by him, and not merely or chiefly the bailee's promise to safeguard the chattel while in his charge, has been held to constitute the consideration moving the bailor to deliver it into his custody⁷. Under modern law, however, it now seems preferable to recognise that the transaction of mandate (in common with that of deposit)⁸ does not give rise to a contract⁹.

An executory transaction of mandate creates no legal obligation, for a person undertaking to perform a voluntary act is not liable if he merely refuses or neglects to perform it¹⁰, and the agreement remains executory at any rate until delivery of the chattel is accepted¹¹.

1 *le mandatum*: see para 2 ante.

2 Money may be regarded as a chattel in this context, whether entrusted to the mandatary in the form of cash or obtained by him by means of a cheque or other negotiable instrument, or as the proceeds of the sale of property which he was authorised to sell on the mandator's behalf. Even where the identical coins need not be used, the mandator may be entitled to treat the equivalent of the sum entrusted to the mandatary as his property, and not merely as a debt due to him, if it is not used or laid out in accordance with the contract. Similarly, the mandator may claim as his own or obtain a charge upon any property purchased with the money in whole or in part, even if it is not the property which ought to have been purchased, and he may follow it if it is lent or given away by the mandatary: see *Taylor v Plumer* (1815) 3 M & S 562; *Re Strachan, ex p Cooke* (1876) 4 ChD 123, CA; *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA; *Banque Belge Pour L'Etranger v Hambrouck* [1921] 1 KB 321, CA. See also *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; *Jones (FC) & Sons (Trustee of the Property of) v Jones* [1997] Ch 159, [1996] 4 All ER 721, CA; *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL. Similarly, the mandatary may claim as his own or obtain a charge upon any property purchased with the money in whole or in part, even if it is not the property which ought to have been purchased. He may follow it if it is lent or given away by the mandatary and may also receive any resulting profits. See *Jones (FC) & Sons (Trustee of the Property of) v Jones* supra.

3 Story on Bailments (9th Edn, 1878) s 137; Palmer *Bailment* (2nd Edn, 1991) p 594. See also Heineccius, Pandects par 3, lib 17, s 230.

4 See paras 6-19 ante.

5 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 918.

6 Jones on Bailments (4th Edn, 1833) p 53. This distinction is criticised by Story on Bailments (9th Edn, 1878) s 140; see further Palmer *Bailment* (2nd Edn, 1991) p 596.

7 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 919; *Banbury v Bank of Montreal* [1918] AC 626 at 657, PC; and see Story on Bailments (9th Edn, 1878) s 140; Pothier's *Contrat de Mandat* c 1.

8 See para 6 ante.

9 Palmer *Bailment* (2nd Edn, 1991) pp 609-622.

10 *Skelton v London and North Western Ry Co* (1867) LR 2 CP 631 at 636 per Willes J; *Elsee v Gatward* (1793) 5 Term Rep 143 at 148 per Lord Kenyon CJ; *Balfe v West* (1853) 13 CB 466; and see *Coggs v Bernard* (1703) 2 Ld Raym 909 at 919. See also NEGLIGENCE.

11 See further para 22 post, and para 16 ante as to the effect of superadded promises given by a depositary on or before receiving possession of the goods.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/21. Extent of bailee's obligations.

21. Extent of bailee's obligations.

The bailee, or mandatary, when he has entered upon the execution of the task which he has undertaken, is bound, in common with all others who render a gratuitous service¹, apart from special contract, to act prudently and honourably and to exercise reasonable care and diligence². This imposes upon him the duty to use such care and diligence a reasonable person would ordinarily use in the performance of the task in question and such skill as he possesses³. In addition, if, because the bailee holds himself out as possessing a professional or other special skill, the bailor entrusts him with the performance of a task which requires the exercise of such skill, he must use it⁴.

The public profession of an art is a representation that the person professing it possesses the necessary skill and ability. When, therefore, a skilled worker or artist is employed, he warrants impliedly that he is possessed of sufficient skill to perform the task that he undertakes, even if the undertaking be without reward⁵.

1 *Wilkinson v Coverdale* (1793) 1 Esp 74; *Dartnall v Howard and Gibbs* (1825) 4 B & C 345; *Gladwell v Steggall* (1839) 5 Bing NC 733; *Harris v Perry & Co* [1903] 2 KB 219, CA; *Karavias v Callinicos* [1917] WN 323, CA; *Pratt v Patrick* [1924] 1 KB 488.

2 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA; *Remme v Wall* (1978) 29 NSR (2d) 39; and see *Copland v Brogan* 1916 SC 277. Earlier expressions of the mandatary's duty in terms of gross negligence would now appear discredited: Palmer *Bailment* (2nd Edn, 1991) pp 598-609.

3 *Beauchamp v Powley* (1831) 1 Mood & R 38; *Beal v South Devon Rly Co* (1864) 3 H & C 337 at 342 per Crompton J; *Shiells and Thorne v Blackburne* (1789) 1 Hy BI 159.

4 *Shiells and Thorne v Blackburne* (1789) 1 Hy BI 159 at 162 per Heath J. See *Bourne v Diggles* (1814) 2 Chit 311; *O'Hanlon v Murray* (1860) 12 ICLR 161; *Wilson v Brett* (1843) 11 M & W 113, where a skilled horseman gratuitously riding a horse to show it to a purchaser on its owner's behalf was held liable for injuring it by riding it on improper ground.

5 *Harmer v Cornelius* (1858) 5 CBNS 236; *Shiells and Thorne v Blackburne* (1789) 1 Hy BI 158. Cf para 69 post.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/22. Bailee's liability.

22. Bailee's liability.

The bailee's failure to discharge his obligations¹ renders him liable to be sued in tort for negligence, or in an independent claim for breach of bailment, if that failure causes damage to the bailor. In addition, as in the case of a depositary, he is responsible to the bailor for the loss of or any damage to the chattel entrusted to him arising out of any breach of duty on his part in respect of its safe custody².

Moreover, the acceptance of the bailment of the chattel by the bailee may constitute a sufficient entering upon the task or service undertaken to make him liable to the bailor if he neglects to carry out his promise, and damage is thereby directly caused to the bailor, even if the neglect amounts only to nonfeasance³. There is uncertainty as to the juridical basis of this

obligation. Older authorities held that where the bailor's only obligation was to hand over the chattel, his doing so constituted performance of his part of the agreement and was the consideration for the bailee's promise to carry out the particular act or perform the service concerned⁴. Under modern law, however, a contractual analysis seems inappropriate. Nor can it be maintained that the bailee's failure to perform constitutes (otherwise than in the most exceptional cases) the tort of negligence⁵. On balance, the duty to perform is preferably regarded as an incident peculiar to the bailment relationship⁶.

It is possible that, owing to the gratuitous nature of the undertaking, the bailee may relieve himself of responsibility by returning the chattel to the bailor at any such time as will enable the undertaking to be performed otherwise⁷.

1 See para 21 ante.

2 See para 15 ante.

3 *Wilkinson v Coverdale* (1793) 1 Esp 74; *Streeter v Horlock* (1822) 1 Bing 34; *Oriental Bank Corpn v R* (1867) 6 NSWSCR 122 at 125 per Faucett J; *Pilcher v Leyland Motors Ltd* [1932] NZLR 449 at 464-467 per Ostler J; *Roufos v Brewster and Brewster* (1971) 2 SASR 218 at 223-224 per Bray CJ; but cf *Heaton v Richards* (1881) 2 NSWLR 73; *Parastatidis v Kotaridis* [1978] VR 449 at 454-455 per Harris J. See further Story on Bailments (9th Edn, 1878) s 171(a)-(c). If, for instance, a bailee undertakes gratuitously to present a bill of exchange for payment and gives all the necessary notices of dishonour on behalf of the holder and receives the bill for him, and then does nothing, and the acceptor is made bankrupt and the holder loses all his remedies against the drawer and indorsers owing to the non-presentment of the bill on the due date, it would appear that the bailee would be liable. See also *Chapman v Morley* (1891) 7 TLR 257.

4 Story on Bailments (9th Edn, 1878) s 171(a)-(c). See *Shillibeer v Glyn* (1836) 2 M & W 143; and cf *Whitehead v Greetham* (1825) 2 Bing 464, Ex Ch.

5 *General Accident Fire and Life Assurance Corpn Ltd v Tanter, The Zephyr* [1985] 2 Lloyd's Rep 529 at 538-539, CA, per Mustill LJ; *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785, [1977] 1 WLR 444.

6 Palmer *Bailment* (2nd Edn, 1991) p 610.

7 Story on Bailments (9th Edn, 1878) s 164.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/23. When bailee is excused from liability.

23. When bailee is excused from liability.

If a contract of mandate is contained in a written instrument which is expressed in ambiguous terms, and the bailee is in fact misled and adopts one interpretation when the bailor intended him to follow the other, then the bailor will be bound, and the bailee will be exonerated¹.

In the case of impossible undertakings the bailee is not liable, unless the bailee should have been aware of the impossibility when giving the undertaking and can be treated as having undertaken to perform in any event. But the impossibility must, in any case, be absolute and not relative; mere difficulty in execution or the violation of trade custom is not sufficient ground for excusing non-performance when once the task is entered upon².

An agreement of mandate for the performance of an immoral or illegal act cannot be enforced, as no court will enforce an illegal contract or transaction or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. It is immaterial whether or not the defendant has pleaded the illegality³.

1 Story on Agency (9th Edn) s 74. See *Ireland v Livingston* (1872) LR 5 HL 395; cf *European Asian Bank AG v Punjab and Sind Bank (No 2)* [1983] 2 All ER 508, [1983] 1 WLR 642, CA. As to interpretation of contracts see CONTRACT vol 9(1) (Reissue) para 772 et seq

2 *Tufnell v Constable* (1838) 7 Ad & El 798. As to the discharge of contracts on the ground of impossibility or frustration see CONTRACT vol 9(1) (Reissue) para 888 et seq.

3 *Scott v Brown, Doering, McNab & Co, Slaughter and May v Brown, Doering, McNab & Co* [1892] 2 QB 724 at 728, CA, per Lindley LJ, citing *Holman v Johnson* (1775) 1 Cowp 341. See further CONTRACT.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/24. Bailee's duty to account.

24. Bailee's duty to account.

A bailee who, under a mandate, receives money or chattels on account of his principal is bound to account for them¹. If he deposits them in his own name, with other chattels of his own of the same kind, in the hands of a third party, he is liable to his principal for any loss or damage to them during the existence of the deposit; and this is so even if his principal was aware of his course of procedure, if he did not assent to it¹.

When the return of the bailed chattel constitutes part of the bailee's obligation, he must restore not only the chattel itself, but also all increments, profits and earnings immediately derived from it².

The bailee is also liable to account to the bailor for any secret profits which he may have received in respect of the conduct or management of the business which he has undertaken gratuitously to perform⁴.

1 *Massey v Banner* (1820) 4 Madd 413.

2 Pothier's Contrat de Mandat ss 58-60. Thus if animals are to be restored, their young also belong to the bailor, and if a vehicle has been delivered to be let for hire, the bailee must account for the hire earned, as well as for the vehicle: Story on Bailments (9th Edn, 1878) s 194. See *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; and paras 46, 62, 86 post. Compare the case of *mutuum*, which is discussed in para 34 post. See also *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb).

3 See *Kimber v Barber* (1872) 8 Ch App 56, CA; and AGENCY vol 1 (2008) PARA 92 et seq.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/25. Misuse of bailed chattel.

25. Misuse of bailed chattel.

When under a mandate a bailee does some act to the bailed chattel unauthorised by the agreement made between himself and the bailor, he becomes responsible for any subsequent loss or damage which may be caused to the chattel by his unwarranted act¹.

1 *Nelson v Macintosh* (1816) 1 Stark 237; *Miles v Cattle* (1830) 4 Moo & P 630; Palmer *Bailment* (2nd Edn, 1991) p 623. Cf paras 19 ante, 32 post.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/26. Duty to return chattel.

26. Duty to return chattel.

As a general rule, a bailee under a mandate is bound to redeliver to his principal the chattel entrusted to him upon the fulfilment of the purpose for which he received it; but if it has been destroyed or damaged without any default on his part, in the absence of special agreement or some positive rule of law, he will be exempt from any claim for damage or non-delivery¹.

¹ Story on Bailments (9th Edn, 1878) s 25.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/27. Delegation by bailee.

27. Delegation by bailee.

As a general rule there is no power of delegation in the contract of mandate; the legal presumption is that the undertaking is personal to the bailee and may not be handed over by him to another¹. But where in the ordinary course of business the custody would naturally devolve upon, or the acts be performed by, some servant or agent of the bailee, delegation is permissible². In such a case the bailee is not liable if, without any negligence on his delegate's part, any loss or damage happens to the chattel during the period of delegation³.

¹ *Bringloe v Morrice* (1676) 1 Mod Rep 210; Palmer *Bailment* (2nd Edn, 1991) p 623. Cf *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA; and see para 39 post.

² *Lord Camoys v Scurr* (1840) 9 C & P 383 at 386 per Coleridge J, where the bailee, having received a mare to try, was held entitled to put a competent person on the mare to try her. See also AGENCY vol 1 (2008) PARA 48 et seq.

³ *Lord Camoys v Scurr* (1840) 9 C & P 383.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(2) MANDATE/28. Reimbursement of bailee.

28. Reimbursement of bailee.

As a general rule, a bailee under a mandate is entitled to his actual disbursements and out-of-pocket expenses in connection with the service he gives, as otherwise a gratuitous act would become a burden¹. It seems, however, that this entitlement may be displaced by the particular circumstances of the mandate². A mandatary who, in discharge of his duty of care, takes measures to protect the bailed goods from exceptional hazards may be entitled to recover the cost of their preservation³.

¹ Story on Bailments (9th Edn, 1878) s 154; Pothier's *Contrat de Mandat* ss 68-78. Cf para 31 post.

² Palmer *Bailment* (2nd Edn, 1991) pp 628-629.

³ *China-Pacific SA v Food Corpn of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; and see AGENCY.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(3) GRATUITOUS LOAN FOR USE/29. Nature of gratuitous loan for use.

(3) GRATUITOUS LOAN FOR USE

29. Nature of gratuitous loan for use.

In deposit¹ and mandate² the bailor has all the advantages of the bailment. In gratuitous loan for use³ the reverse is the case. This is a bailment where a chattel is lent by its owner to the bailee for the express purpose of conferring a benefit upon the bailee, without any corresponding advantage to its owner⁴.

By English law this agreement is confined to goods, chattels or personal property, and does not, as under the Roman civil law, extend to real estate⁵. The loan of the use of real estate or chattels real is no more than a licence beneficially to occupy a tenement or other hereditament belonging to the licensor for a particular or indeterminate period⁶. Consequently there can be no bailment of a structure affixed to real property.

1 *le depositum*: see paras 2, 6-19 ante.

2 *le mandatum*: see paras 2, 20-28 ante.

3 *le commodatum*: see para 2 ante.

4 Cf *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb), where on an alleged continuing bailment of pallets the transaction was held not to be one of *commodatum* or loan.

5 Story on Bailments (9th Edn, 1878) s 223.

6 *Williams v Jones* (1865) 3 H & C 602.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(3) GRATUITOUS LOAN FOR USE/30. Borrower's obligations.

30. Borrower's obligations.

The lender must be taken to lend for the purpose of a beneficial use by the borrower. The borrower, therefore, is not responsible for reasonable wear and tear¹. Older authority holds that, as the borrower alone receives benefit from the agreement, he is liable for the slightest degree of negligence; and he is bound to exercise the utmost degree of care in regard to the bailed chattel² and anything accessory to it³. Under modern law, however, the borrower's responsibility is likely to be regarded as one of reasonable care and diligence in all the circumstances of the case⁴.

What is proper diligence, and what constitutes neglect, in a borrower in his custody of the chattel lent depends upon the circumstances of each particular case, the nature of the chattel lent and the character and occupation of the borrower⁵.

As a general rule the borrower is not liable if, without any default on his part, the performance of his agreement becomes an absolute impossibility; nor is he liable for loss or injury arising from a third person's wrongful act which could not be reasonably foreseen or prevented, or from the results of external and irresistible violence⁶.

The borrower's liability, however, is qualified where a special agreement is substituted for the obligation imposed by the common law, and possibly also, though this has been denied, where there has been an offer of the chattel by the lender to the borrower⁷.

The borrower is liable if he detains the chattel from its owner after demand, or after the agreed time for its return has expired. In that event, he becomes liable as an insurer⁸.

1 *Blakemore v Bristol and Exeter Rly Co* (1858) 8 E & B 1035 at 1051 per Coleridge J; *Pomfret v Ricroft* (1669) 1 Wms Saund 321 at 323. See also *Moorhouse v Angus & Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700 at 708 per Samuels JA, NSW CA.

2 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 915 per Holt CJ. See also *Vaughan v Menlove* (1837) 3 Bing NC 468 at 475 per Tindal CJ; Jones on Bailments (4th Edn, 1833) pp 64-65. This view of the measure of the borrower's responsibility is also taken by Pothier, who says that it is not sufficient for the borrower to exert the same ordinary care which fathers of families are accustomed to use about their own affairs, but that he ought to exert all possible care, such as the most careful persons apply to their own affairs, and that he is liable, not only for a slight fault, but also for the slightest fault: Pothier's *Prêt à Usage* s 48.

This superlative degree of carefulness (the *exactissima diligentia* of the Roman law) has, however, been doubted by some jurists, one of whom states that the person to whom the thing is lent is not obliged to answer for any uncontrollable force, or for the loss or damage of the thing which happens by any fortuitous case, provided the accident does not intervene through his fault or neglect, for it is necessary that he should take the same care of the thing as every prudent man would take of his own goods, since this contract is entered into for his sake: Ayliffe's *New Pandect of Roman Civil Law* book 4, tit 16, p 517.

3 Jones on Bailments (4th Edn, 1833) p 66.

4 *Swann v Seal* (19 March 1999, unreported), CA but note that the question was left open as not arising for decision in *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb); and see further *Walker v Watson* [1974] 2 NZLR 175; *Fairley & Stevens (1966) Ltd v Goldsworthy* (1973) 34 DLR (3d) 554 at 562, 568 per Dubinsky J (obiter); Palmer *Bailment* (2nd Edn, 1991) pp 665-669.

5 Wherever a hirer is responsible (see para 58 post), a fortiori a borrower is also responsible; and he may be responsible where a hirer is not, seeing that greater diligence is required of him.

6 Pothier's *Prêt à Usage* ss 38-55, 56. See also note 2 supra. Consequently, if the borrower's house is destroyed by fire and, owing to his exertions in saving his own chattels, he is unable to save the chattel he has borrowed, it is extremely doubtful whether he must compensate the owner for its destruction merely because he preferred his own property to that which had been lent to him for his benefit: Pothier's *Prêt à Usage* s 56. Pothier, basing himself upon the Roman law, takes the view that he must compensate the owner, and Sir William Jones accedes to this doctrine (Jones on Bailments (4th Edn, 1833) p 69), but it is very doubtful if it is law in England. Cf Story on Bailments (9th Edn, 1878) s 345 et seq. A borrower, however, is usually liable to the lender for any loss or damage, if he borrowed the chattel from its owner merely for the purpose of saving his own chattels from risk of damage or destruction. He may, however, be exempt if he can prove that he had previously disclosed to its owner that his object in borrowing it was to enable him to avoid hazarding his own property: Jones on Bailments (4th Edn, 1833) p 70.

7 Pothier's *Prêt à Usage* s 52. Cf para 10 text and notes 4, 5 supra.

8 Jones on Bailments (4th Edn, 1833) p 70. Cf *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779 (deposit); *Shaw & Co v Symmons & Sons* [1917] 1 KB 799 (bailment for reward). As to improper use see para 33 post.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(3) GRATUITOUS LOAN FOR USE/31. Borrower's expenses.

31. Borrower's expenses.

If in his use of what is lent the borrower is put to any ordinary expense, such as filling a car with petrol, he must, in the absence of any agreement to the contrary, bear the expense himself, for it is he who derives advantage from the use¹.

Extraordinary expenses incurred by the borrower in the preservation of the chattel lent, whether arising from inherent defect, or viciousness peculiar to the chattel itself, or from circumstances altogether beyond his control, such as the tortious acts of third parties, may be recoverable from the lender if, in incurring those expenses, the borrower was performing his duty of care. It is doubtful, however, whether the borrower has a lien on the chattel for the amount of such charges if paid by him².

1 *Handford v Palmer* (1820) 2 Brod & Bing 359; 1 Domat book 1, tit 5, s 3, art 4.

2 The French jurists say that the lender must pay such expenses: Pothier's *Prêt à Usage* ss 81-83; 1 Domat book 1, tit 5, s 3, art 4; cf Story on Bailments (9th Edn, 1878) ss 273, 274; and para 28 ante. See also *China-Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(3) GRATUITOUS LOAN FOR USE/32. Lender's obligations.

32. Lender's obligations.

If the lender is aware of any defect in the chattel which is not apparent and renders it unfit for the purpose for which it is lent, and fails to communicate the fact to the borrower, who in consequence is injured, the borrower can recover damages against the lender for the injuries so caused¹. So also, if the chattel lent has been put on one side and not used for years, and is then lent without any intimation to the borrower of this fact and, in consequence of its being out of repair, injury is caused to the borrower, he can recover in a claim against the lender². In order to fix the lender with liability, the use must be of a kind contemplated by him at the time of lending, or subsequently authorised by him³.

It is uncertain whether the lender is liable for defects in the chattel of which he was unaware, but of which he should reasonably have been aware, when he delivered the chattel to the borrower. Older authority holds that the lender is not liable for injuries occasioned by such defects⁴. Under modern law, however, it would appear that the lender owes a duty of reasonable care to warn the borrower of any defect in the chattel of which the lender should reasonably have been aware⁵.

The lender is not liable to third parties for damage caused by the negligent use of the chattel by the bailee⁶.

1 *Blakemore v Bristol and Exeter Rly Co* (1858) 8 E & B 1035 at 1051 per Coleridge J; *Coughlin v Gillison* [1899] 1 QB 145 at 147, CA, per AL Smith LJ; *MacCarthy v Young* (1861) 6 H & N 329. The bailor may indeed be liable to a third party who is injured by reason of the bailee's user of the defective chattel: see *Blacker v Lake and Elliot Ltd* (1912) 106 LT 533, DC; and NEGLIGENCE. Cf *Pivovarov v Chernabaef* (1978) 21 SASR 1 (warning given by bailor).

2 *Coughlin v Gillison* [1899] 1 QB 145 at 148, CA, per Rigby LJ.

3 *Blakemore v Bristol and Exeter Rly Co* (1858) 8 E & B 1035; *Say v Cementation Construction Ltd* (18 October 1995, unreported), CA.

4 *MacCarthy v Young* (1861) 6 H & N 329; *Coughlin v Gillison* [1899] 1 QB 145, CA. Cf *Longmeid v Holliday* (1851) 6 Exch 761 at 767-768 per Parke B. The same rule applies to gifts: *Gautret v Egerton* (1867) LR 2 CP 371 at 375 per Willes J. The operations of lending and giving are known to the law, and the rule relating to them must be strictly confined to the special relations thereby created: see *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 591, HL, per Lord Atkin (where in the phrase 'letting or giving', 'letting' is obviously a slip for 'lending'). Different considerations, therefore, apply to the case of a master providing things to be used by his servants for his business: see *Baker v James* [1921] 2 KB 674. For a somewhat exceptional extension of this principle see *Chapman (or Oliver) v Saddler & Co* [1929] AC 584, HL, distinguishing *Caledonian Rly Co v Mulholland* [1898] AC 216, HL. It is, however, artificial to regard the relationship of gratuitous bailment as

obtaining in the situation of the common interchange of tools and machinery between employers and workpeople; the user there is not gratuitous because each has an interest in the mutual prosecution of the common work, and in this situation the ordinary law of negligence applies, the issues being whether the danger was reasonably foreseeable if no precautions were taken, and whether the defendant was under a duty to take reasonable precautions to guard against the risk: see *Griffiths v Arch Engineering Co (Newport) Ltd* [1968] 3 All ER 217 at 220 per Chapman J; *Say v Cementation Construction Ltd* (18 October 1995, unreported), CA. See also TORT; NEGLIGENCE. As to the liability of an employer whose employee suffers personal injuries because of a defect in equipment provided by the employer, where the defect is attributable wholly or partly to the fault of a third party, see the Employers' Liability (Defective Equipment) Act 1969 s 1; and EMPLOYMENT vol 39 (2009) PARA 33; HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 412.

5 See *Griffiths v Arch Engineering Co (Newport) Ltd* [1968] 3 All ER 217; *Wheeler v Copas* [1981] 3 All ER 405; *Campbell v O'Donnell* [1967] IR 226; *Pivovarov v Chernabaeff* (1978) 21 SASR 1 (in none of which did the question fall to be decided); *Palmer Bailment* (2nd Edn, 1991) pp 630-665. See also *Flack v Hudson* [2001] QB 698, [2001] 2 WLR 982, CA.

6 *Hewitt v Bonvin* [1940] 1 KB 188, CA. The bailor will be excused from liability only if the bailee is a person of ordinary discretion. To place a chattel in the hands of a child or other person incapable of appreciating its dangerous propensities, whether by way of gift, loan or otherwise, is an act of negligence and raises different questions: see *Dixon v Bell* (1816) 5 M & S 198; *Say v Cementation Construction Ltd* (18 October 1995, unreported), CA; and NEGLIGENCE vol 78 (2010) PARA 50.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(3) GRATUITOUS LOAN FOR USE/33. Use of chattel lent.

33. Use of chattel lent.

The borrower must use the chattel only for the particular purpose for which it was lent to him, and if he uses it for any materially different purpose he becomes liable as an insurer¹.

Generally speaking, the permission accorded by the owner of a chattel to a borrower to use it is purely personal, and cannot, except by the owner's express consent, be extended to a third party². The reason for this limitation is that the chattel is lent by the owner to a person with whose capacity and honesty he is presumably familiar. Therefore, should the borrower license a third party to use it, the bailment is thereby determined, and the borrower becomes responsible for any accident that may happen³.

When, however, the actual use by a third party is necessary for the reasonable enjoyment of the chattel lent, the mere fact of its being lent for use implies a limited power of delegation in the borrower⁴. Thus the loan of a traction engine, a threshing machine, or some other piece of machinery, must, in the majority of cases, of necessity imply both superintendence and use by some person other than the actual and responsible borrower⁵.

1 Bac Abr Bailment C; Pothier's Prêt à Usage s 21. See also *Coggs v Bernard* (1703) 2 Ld Raym 909 at 915 per Holt CJ ('if a man should lend another a horse to go westward or for a month, if the bailee go northward or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable'). Cf *Wilson v Shepherd* 1913 SC 300 (defender, at the request of the bailee of aerated water bottles belonging to the pursuer, put paraffin into them). Cf para 25 ante. Note that the French rule is the same (Code Civil art 1881).

2 Story on Bailments (9th Edn, 1878) s 234.

3 *Bringle v Morrice* (1676) 1 Mod Rep 210; cf *Ballett v Mingay* [1943] KB 281, [1943] 1 All ER 143, CA; and see *Gwilliam v Twist* [1895] 2 QB 84, CA.

4 Story on Bailments (9th Edn, 1878) s 234 (if A lends his horse to B to make a certain ride, B alone may ride him, but that if he lends his horses and carriage to B for a month the use of them by B's family may be fairly presumed to be contemplated by A).

⁵ See *Lord Camoys v Scurr* (1840) 9 C & P 383, where the defendant was held entitled to put up a groom to ride a mare lent to the defendant for trial.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(4) GRATUITOUS QUASI-BAILMENT/34. Nature of gratuitous quasi-bailment.

(4) GRATUITOUS QUASI-BAILMENT

34. Nature of gratuitous quasi-bailment.

Gratuitous quasi-bailment, or *mutuum*, is the loan of something which is not to be returned in specie, but which is to be replaced by something similar and equivalent¹. The contract of *mutuum* differs from that of gratuitous loan for use, or *commodatum*², in that in the latter a bare possession of the chattel lent, as distinguished from the property in it, vests in the borrower, the general property in it still remaining in the lender; whereas in *mutuum* that property in the chattel passes from the lender to the borrower.

Mutuum is confined to chattels which are intended to be consumed and which are capable of being estimated by number, weight, or measure, such as money, corn, or wine³. A familiar example is the borrowing of a packet of sugar from a neighbour.

The essence of the transaction in the case of such loans is not that the borrower should return to the lender the identical chattels lent, for such specific return would ordinarily render the loan valueless, but that upon demand or at a fixed date the lender should receive from the borrower an equivalent quantity of goods of similar quality. Thus if money is advanced, its value in money must be returned, and if corn, wine or sugar is lent, then similar corn, wine or sugar of an equivalent amount must be returned; and enhancement in the commercial value of the commodity lent will not justify the borrower in tendering a less quantity than he actually received⁴.

It is not, however, a transaction of *mutuum* if a bargain is made by which an equivalent value of wine is to be returned for oil, or meat for corn. Such an exchange constitutes a contract of barter, and therefore comes within a different category of transaction altogether⁵.

¹ Just Inst lib 3, tit 14; *Parastatidis v Kotaridis* [1978] VR 449 at 456 per Harris J, where the text was approved. Cf *Coleman v Harvey* [1989] 1 NZLR 723 at 725, NZ CA, per Cooke P. See also *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb).

² See para 29 ante.

³ 1 Domat book 1, tit 6, s 1; Story on Bailments (9th Edn, 1878) ss 283, 284.

⁴ 1 Domat book 1, tit 6, s 1, art 9.

⁵ 1 Domat book 1, tit 6, s 1, art 10; Jones on Bailments (4th Edn, 1833) pp 64, 102. As to barter see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 1.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(4) GRATUITOUS QUASI-BAILMENT/35. Duty to return chattel.

35. Duty to return chattel.

As a necessary consequence of the absolute transfer of the property in, as well as the custody of, the chattel lent, the borrower is not, by reason of its accidental loss or destruction, released from his obligation to return to the owner its equivalent in kind upon demand, for it is the borrower's property, and the rule is that the risk passes with the property in the chattel¹.

An actual demand is, however, a condition precedent to a claim for the non-delivery of the equivalent; just as where a man deposits money in the hands of another, to be kept for his use, the possession of the bailee is deemed the possession of the owner until an application and refusal, or other denial of the right. For the purposes of the Limitation Act 1980, time runs against the bailor from the date of such demand only².

1 *le ejus est periculum, cujus est dominium*: Story on Bailments (9th Edn, 1878) s 283; St Germain's Doctor and Student (ed Murchall) (1815) 2nd dial chap xxxviii.

2 *Re Tidd, Tidd v Overell* [1893] 3 Ch 154 at 156 per North J, approving 2 Pothier's Law of Obligations (ed Evans) 126; and see *South Australian Insurance Co v Randell* (1869) LR 3 PC 101; and LIMITATION PERIODS. See also para 87 post.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(4) GRATUITOUS QUASI-BAILMENT/36. Pro-mutuum.

36. Pro-mutuum.

Whenever a person, acting under misapprehension as to an existing fact or state of facts, delivers to another a chattel which cannot be restored in specie, there arises the quasi-contract of *pro-mutuum*, which imposes upon the recipient the obligation to restore its equivalent. *Pro-mutuum* differs from *mutuum*¹ in that this obligation is imposed by law, whereas in *mutuum* it arises out of the voluntary agreement between the lender and the borrower; it resembles *mutuum* in that the subject matter to which it relates must always consist of money or fungibles, that is, chattels which, owing to their being consumed in the using, cannot be restored in specie.

The liability only arises out of an actual delivery of such chattels by one person to another, and the repayment of the obligation in chattels answering to the generic description of those advanced will always satisfy it. Thus if one man owes another 20 bushels of wheat, and by a mistake as to the amount of his indebtedness, pays to his creditor 30 bushels in satisfaction of the supposed liability, the recipient is a bailee to his former debtor of the bushels overpaid, and, as such, is bound to account to him for the surplus. A similar liability arises if a man discharges a debt twice over, or pays the debt of another under a mistaken assumption of fact as to his liability²; the general rule in such cases is that where money is paid to another under a mistake of fact, a claim will lie to recover it³. As, however, the original cause of the obligation is the payer's mistake, the recipient is, as a rule, bound only to repay to him the actual amount overpaid, without interest⁴. A demand is a condition precedent to a claim⁵.

1 See para 34 ante.

2 Pothier's Contrat de Prêt de Consommation ss 132-134. See also *Cox v Prentice* (1815) 3 M & S 344; *Newall v Tomlinson* (1871) LR 6 CP 405; *Milnes v Duncan* (1827) 6 B & C 671.

3 *Kelly v Solari* (1841) 9 M & W 54 at 58 per Parke B. See MISTAKE.

4 Pothier's Contrat de Prêt de Consommation s 138.

5 *Kelly v Solari* (1841) 9 M & W 54. See para 85 post.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/2. GRATUITOUS BAILMENT/(4) GRATUITOUS QUASI-BAILMENT/37. Intermixture of chattels.

37. Intermixture of chattels.

Where the chattels of two persons are intermixed by agreement¹, so that the several portions can no longer be distinguished, the proprietors have an interest in common in proportion to the respective shares².

If a bailee, without his bailor's consent, intermixes his own chattels with those belonging to his bailor, and the intermixed goods are of substantially the same nature and quality and cannot in practice be separated, the mixture will be generally held in common in such proportion as each party contributed to the combination³. This general rule applies where the intermixture results from an act of God or the act of an unauthorised third party⁴ as well as from the inadvertence or wilful conduct of a bailee⁵. However, any cost attendant upon the separation into shares must be borne by the bailee⁶. Moreover, a proprietor who, by wilfully intermixing his chattels with those of another, has destroyed the evidence by which the innocent proprietor could show how much he has lost must suffer from the resulting uncertainty⁷. In such a case, there is a presumption of utmost value in favour of the innocent proprietor, and he will be awarded the largest proportion of the whole that is consistent with the evidence⁸. If there is a complete absence of evidence as to the quantity of the innocent proprietor's goods which has been contributed to the mixture, the whole belongs to him⁹.

If there is a diversity in quality in the intermixed substances the whole should be divided and a greater allowance made to the owner whose substance is better or finer than that of the other¹⁰.

1 See Just Inst lib 2, tit 1, s 28.

2 2 Bl Com 405; *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680 at 694-695, HL, per Lord Moulton; *Coleman v Harvey* [1989] 1 NZLR 723, NZ CA (where the text was approved). As to following trust money see EQUITY vol 16(2) (Reissue) para 861 et seq.

3 *Indian Oil Corpn Ltd v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345, [1987] 3 All ER 893; *Mercer v Craven Grain Storage Ltd* (17 March 1994, unreported), HL; *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb); *Glencore International AG v Metro Trading International Inc* [2002] EWCA Civ 138; and cf *Re Stapylton Fletcher Ltd* [1995] 1 All ER 192, [1994] 1 WLR 1181, [1994] BCC 532, Ch (Companies Court); *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 806, PC. As to sale of goods from bulk see the Sale of Goods (Amendment) Act 1995; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 134 et seq.

4 See *Spence v Union Marine Insurance Co Ltd* (1868) LR 3 CP 427, where the doctrine was applied to goods belonging to different owners on board ship, which had become indistinguishable owing to the obliteration of identification marks; *Gill and Duffus (Liverpool) Ltd v Scruttons Ltd* [1953] 2 All ER 977, [1953] 1 WLR 1407, where bags of chestnuts in the hold of a ship, which were consigned to different merchants, burst on the voyage. As to the limits of the applicability of this doctrine to such cases, see *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680, HL. The dictum of Lord Russell of Killowen in *Smurthwaite v Hannay* [1894] AC 494 at 505, HL, must be read in the light of the latter case. See further SHIPPING AND MARITIME LAW. See also Mackeldey's Modern Civil Law (special part), Book 1, s 270.

5 *Indian Oil Corpn Ltd v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345, [1987] 3 All ER 893; and see *Coleman v Harvey* [1989] 1 NZLR 723, NZ CA, especially at 726-727 per Cooke P. Formerly, it was thought that a bailee who wilfully intermixed his goods with those of another proprietor could not claim ownership of any part of the combined corpus, which belonged in its entirety to the innocent proprietor: see *Lupton v White* (1808) 15 Ves 432 at 440 per Lord Eldon; 2 Bl Com 405; *Colwill v Reeves* (1811) 2 Camp 575 at 576 per Lord Ellenborough (if a man puts corn into my bag, in which there is before some corn, the whole is mine, because it is impossible to distinguish what was mine from what was his; but it is impossible that articles of furniture can be blended together so as to create the same difficulty). But see *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680 at 695, HL, per Lord Moulton.

6 *Buckley v Gross* (1863) 3 B & S 566 at 575 per Blackburn J; *Jones v Moore* (1841) 4 Y & C Ex 351.

7 *Indian Oil Corpn Ltd v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345, [1987] 3 All ER 893, applying *Armory v Delamirie* (1722) 1 Stra 505. See also *Colbeck v Diamanta (UK) Ltd* [2002] EWHC 616 (QB), [2002] All ER (D) 336 (Feb).

8 *Indian Oil Corpn Ltd v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345, [1987] 3 All ER 893; *Armory v Delamirie* (1722) 1 Stra 505; *Colbeck v Diamanta (UK) Ltd* [2002] EWHC 616 (QB), [2002] All ER (D) 336 (Feb).

9 *Indian Oil Corpn Ltd v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345 at 370-371, [1987] 3 All ER 893 at 907-908 per Staughton J.

10 Ayliffe's New Pandect of Roman Civil Law Book 3, tit 3, p 292.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(i) Nature of the Contract/38. Hire of custody distinguished from deposit.

3. BAILMENT FOR VALUABLE CONSIDERATION

(1) HIRE OF CUSTODY

(i) Nature of the Contract

38. Hire of custody distinguished from deposit.

The hire of custody¹ is a form of bailment comparable in some respects to that of deposit². The two forms of bailment, however, differ materially in that whilst in deposit there is no reciprocity of advantage, all the benefit being conferred on the bailor, in the contract of hire of custody there is a mutual advantage to both the owner of the chattel and the person who undertakes to keep it safely for reward³.

The contract of custody for reward, which is consensual⁴ and need not be evidenced by writing, requires for its inception the concurrence of the following conditions: (1) the subject matter must be a chattel; (2) the possession of the chattel must be capable of transfer from one party to the other and must actually be transferred⁵; (3) the custody of the chattel must be the object of the transfer of possession; and (4) the transfer of the custody must be temporary and not permanent⁶.

Given these conditions, the custodian's obligation for hire commences as soon as by any overt act he evidences an intention of exercising responsibility over the chattel entrusted to him, for instance, by applying a crane to raise goods into a warehouse⁷.

1 *le locatio custodiae*: see para 2 note 9 ante.

2 *le depositum*: see paras 2, 6-19 ante. The liability of an innkeeper (ie the proprietor of a hotel within the meaning of the Hotel Proprietors Act 1956) differs from that of an ordinary bailee and is governed by s 2: see LICENSING AND GAMBLING vol 67 (2008) PARA 198 et seq.

3 Story on Bailments (9th Edn, 1878) s 442. The reward need not be money; it may be money's worth, and there need not be a specific reward for the custody if there is a reward for services which in fact cover the custody: see *Martin v LCC* [1947] KB 628, [1947] 1 All ER 783 (hospital taking charge of patient's property); *Andrews v Home Flats Ltd* [1945] 2 All ER 698, CA (landlords of block of flats providing a room for baggage). See also *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May).

4 *Buxton v Baughan* (1834) 6 C & P 674; *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May).

5 *Ashby v Tolhurst* [1937] 2 KB 242, [1937] 2 All ER 837, CA (car placed in car park on payment of a fee for which a receipt, called a 'car park ticket', was given; it was held that there was no contract of bailment, but mere licence); *Tinsley v Dudley* [1951] 2 KB 18, [1951] 1 All ER 252, CA (customer's motorcycle stolen from yard of public house, which was not an inn; the licensee was held not liable as the motorcycle had not been delivered into his possession and he was unaware that it had been brought onto his premises; there was therefore no bailment). See also the other cases cited in para 1 note 9 ante.

6 Pothier's *Contrat de Louage* s 6 (*mutatis mutandis*).

7 *Thomas v Day* (1803) 4 Esp 262. See also *Chapman v Great Western Rly Co* (1880) 5 QBD 278; *Cailiff v Danvers* (1792) Peake 114; *Mitchell v Lancashire and Yorkshire Rly Co* (1875) LR 10 QB 256. See also *Re Webb* (1818) 8 Taunt 443; *Bourne v Gatcliffe* (1841) 3 Man & G 643; *Cairns v Robins* (1841) 8 M & W 258; *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51; *Great Western Rly Co v Crouch* (1858) 3 H & N 183; and CARRIAGE AND CARRIERS vol 7 (2008) PARAS 22-23.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/39. Care and diligence.

(ii) Bailee's Obligations

39. Care and diligence.

A custodian for reward¹ must exercise reasonable care for the safety of the article entrusted to him². The standard of care and diligence imposed on the custodian is that demanded by the circumstances of the particular case³. The precautions required of him may therefore be more exacting than those required of a gratuitous depositary⁴.

On demand he must return the chattel to the bailor or deliver it in accordance with his instructions⁵; if he fails to do so, or if he misdelivers, the owner, if he has the right to immediate possession, or if there has been conversion or damage to the chattel, may bring a claim direct against the wrongdoer⁶.

The custodian is therefore bound to take reasonable care to see that the place in which the chattel is kept⁷, and the tackle used in connection with it⁸, are fit and proper for the purpose, to see that the chattel is in proper custody⁹, to protect it against unexpected danger should that arise¹⁰, to recover it if it is stolen¹¹, and to safeguard the bailor's interest against adverse claims¹². If the chattel is injured through his negligence, he will not be excused on the ground that it has been subsequently destroyed by inevitable mischance¹³.

In the absence of any special contract binding the bailee to some higher responsibility, or of any deviation on his part from the principal terms of the bailment, the bailee is not an insurer¹⁴ and therefore, in the absence of negligence on his part, he is not liable for the loss of or damage to the chattel due to some accident¹⁵, fire¹⁶, the acts of third parties, or the unauthorised acts of his servants acting outside the scope of their employment¹⁷. But if he entrusts the duty to take care of the chattel to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty¹⁸.

The custodian must deal with the chattel in the manner authorised by the bailor¹⁹; he may not without authority hand it over to a third party for storage²⁰. If he deals with it in a manner not authorised, he takes upon himself the risk of so doing, and may be precluded from relying upon stipulations inserted in the contract in his favour²¹. He will also be liable for any loss or damage, except such as arises from causes which he shows to be independent of his acts or inherent in the chattel itself²².

The obligation to take due care exists independently of contract. A claim based on breach of the obligation can be founded on bailment or on tort²³.

1 Among such custodians are included auctioneers, agisters of cattle, warehousemen, forwarding merchants and wharfingers: *Story on Bailments* (9th Edn, 1878) s 442. See also *Scarborough v Cosgrove* [1905] 2 KB 805, CA; *Paterson v Norris* (1914) 30 TLR 393 (boarding-house keepers); *Olley v Marlborough Court Ltd* [1949] 1 KB 532, [1949] 1 All ER 127, CA (proprietor of hotel which is not an inn); *Martin v LCC* [1947] KB 628, [1947] 1 All ER 783 (hospital managers). As to dock and harbour authorities see SHIPPING AND MARITIME LAW.

2 *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Coldman v Hill* [1919] 1 KB 443, CA; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA; *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* (1990) Times, 7 March; *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May).

3 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 698, [1962] 2 All ER 159 at 161, CA. See also para 3 ante. The bailor's knowledge of the conditions in which the bailee proposes to keep the goods (or in which he keeps goods of a similar nature) does not ordinarily affect the bailee's obligation to keep the goods with reasonable care and skill: *Brabant & Co v King* [1895] AC 632, PC; *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA; *Thames Tideway Properties Ltd v Serfaty & Partners* [1999] 2 Lloyd's Rep 110, Central London County Court at paras 34-35 per Brian Knight QC. The position can differ, however, where the bailee can show that, by reason of such knowledge or other matters, the bailor consented to a lower standard of safekeeping than would otherwise have been imposed in the circumstances: see, eg *Idnani v Elisha* [1979] RTR 488, CA; *Saunders (Mayfair) Furs Ltd v Chas Wm Davies Ltd* [1966] 1 Lloyd's Rep 78; cf *Thames Tideway Properties Ltd v Serfaty & Partners* supra at paras 34-35 per Brian Knight QC. Also see generally Palmer *Bailment* (2nd Edn, 1991) pp 818-823.

4 *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 at 589, [1978] 3 All ER 337 at 339, PC; *Garlick v W & H Rycroft Ltd* [1982] CA Transcript 277. See para 15 ante; and see *Samuel v Westminster Wine Co Ltd* (1959) Times, 16 May. See also *Coggs v Bernard* (1703) 2 Ld Raym 909 at 914, 916 per Holt CJ; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 725-726, [1965] 2 All ER 725 at 731, CA, per Lord Denning MR; *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535. See Jones on Bailments (4th Edn, 1833) pp 86-87; *Dean v Keate* (1811) 3 Camp 4; and see the note to that case at 3 Camp 5.

5 *Hooper v London and North Western Rly Co* (1880) 50 LQB 103 at 105, DC; *Alexander v Railway Executive* [1951] 2 KB 882 at 884-885, [1951] 2 All ER 442 at 444. A delivery order is a mere authority to a buyer to receive possession of goods; by itself it spells no promise of delivery: *Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195 at 198, [1969] 2 All ER 504 at 510. For the meaning of 'delivery' see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 163.

6 *Manders v Williams* (1849) 4 Exch 339 at 314; *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL. See further para 88 post. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq and as to conversion by bailees see TORT vol 45(2) (Reissue) para 605.

7 *Searle v Laverick* (1874) LR 9 QB 122; *Brabant v King* [1895] AC 632, PC; *Turner v Stallibrass* [1898] 1 QB 56, CA; *Martin v LCC* [1947] KB 628, [1947] 1 All ER 783; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA. Cf *Marfell v South Wales Rly Co* (1860) 8 CBNS 525 at 537 per Byles J. See *Saunders (Mayfair) Furs Ltd v Chas Wm Davies Ltd* [1966] 1 Lloyd's Rep 78.

8 *Thomas v Day* (1803) 4 Esp 262.

9 *Quiggin v Duff* (1836) 1 M & W 174 at 180 per Lord Abinger CB. Cf *Re United Service Co, Johnston's Claim* (1871) 6 Ch App 212. It is not sufficient for the bailee merely to institute a safe security system if he fails on a given occasion to operate that system with reasonable diligence and care: *Spriggs v Sotheby Parke Bernet & Co Ltd* [1986] 1 Lloyd's Rep 487, CA; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Global Dress Co Ltd v WH Boase & Co Ltd* [1966] 2 Lloyd's Rep 72, CA; Palmer *Bailment* (2nd Edn, 1991) ch 13.

10 *Brabant v King* [1895] AC 632, PC, at 640. See also *Liverpool Grain Storage and Transit Co Ltd v Charlton and Bagshaw* (1918) 146 LT Jo 20, HL. However, if the bailee provides a reasonably fit place for storing the chattels he is not responsible if that place proves defective under exceptional and unlooked-for stress: *Searle v Laverick* (1874) LR 9 QB 122; *Broadwater v Blot* (1817) Holt NP 547; *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534 at 540, [1950] 1 All ER 1072 at 1080, CA, per Somervell LJ (premises damaged by enemy action).

- 11 The duty to seek to recover the stolen chattel exists even though the theft occurred without default on the part of the bailee: *Coldman v Hill* [1919] 1 KB 443, CA.
- 12 *Ranson v Platt* [1911] 2 KB 291, CA. See para 82 post.
- 13 Story on Bailments (9th Edn, 1878) s 450(a).
- 14 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 918 per Holt CJ ('He is only to do the best he can. And if he be robbed it is a good account. If he receives money and keeps it locked up with reasonable care he shall not be answerable for it though it be stolen'). See also *Liver Alkali Co v Johnson* (1874) LR 9 Exch 338, Ex Ch; *Consolidated Tea and Lands Co v Oliver's Wharf* [1910] 2 KB 395.
- 15 *Searle v Laverick* (1874) LR 9 QB 122 (building collapsing).
- 16 *Garside v Trent and Mersey Navigation Proprietors* (1792) 4 Term Rep 581; *Chapman v Great Western Rly Co* (1880) 5 QBD 278; *Turner v Civil Service Supply Association* [1926] 1 KB 50; *Fagan v Green and Edwards Ltd* [1926] 1 KB 102; *Watkins v Cottell* [1916] 1 KB 10; *F & C Clarke Ltd and Pickwick Foods Ltd v Redburn Wharves Ltd* [1974] 1 Lloyd's Rep 52.
- 17 *Finucane v Small* (1795) 1 Esp 315 (theft); *Mintz v Silverton* (1920) 36 TLR 399 (theft by servant, there being no negligence in selecting the servant); contrast *Williams v Curzon Syndicate Ltd* (1919) 35 TLR 475, CA; and *Nahhas v Pier House (Cheyne Walk) Management Ltd* (1984) 270 Estates Gazette 328; *Sanderson v Collins* [1904] 1 KB 628, CA (servant took out carriage for his own purpose, without his master's knowledge); *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796 (night watchman of garage took out car for his own purpose, the master having delegated to him the duty of keeping the car safely); *Aitchison v Page Motors Ltd* (1935) 154 LT 128 (manager of garage, with authority to do so, collected customer's car from manufacturer's works, and used it for his own purposes).
- 18 *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 728, 736, 741, [1965] 2 All ER 725 at 732, 737, 740, CA (sub-bailee liable for his servant's theft); *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700 (loss of goods through acts of port agents). See also *Adams (Durham) Ltd and Day v Trust Houses Ltd* [1960] 1 Lloyd's Rep 380 at 386 (unauthorised driving of car by servant); *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811 at 820, 824, CA (negligence of independent contractor).
- 19 *Streeter v Horlock* (1822) 1 Bing 34 at 36; *Lilley v Doubleday* (1881) 7 QBD 510 at 511 per Grove J.
- 20 *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA. See also *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.
- 21 *Gibaud v Great Eastern Rly Co* [1921] 2 KB 426 at 431, CA, per Lord Sterndale MR, and at 435 per Scrutton LJ; *London and North Western Rly Co v Neilson* [1922] 2 AC 263 at 273-274, HL, per Lord Atkinson; *Buerger v Cunard Steamship Co* [1925] 2 KB 646 at 663, CA, per Atkin LJ (affd sub nom *Cunard Steamship Co v Buerger* [1927] AC 1, HL); *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442 (allowing an unauthorised person to have access to goods deposited in a railway parcels office); *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940 (unauthorised sub-bailment). See *Palmer Bailment* (2nd Edn, 1991) pp 834-840, 902-906; and see generally as to exclusion clauses and similar exculpatory terms CONTRACT.
- 22 *Davis v Garrett* (1830) 6 Bing 716 at 724 per Tindal CJ; *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783 at 795-796, CA, per Swinfen Eady LJ, and at 800 per Phillimore LJ; *Lilley v Doubleday* (1881) 7 QBD 510 (where the defendant contracted to warehouse certain goods for the plaintiff at a particular place but, contrary to the terms of his agreement, he warehoused part of them at another place where, without any negligence on his part, they were destroyed); *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA (where the defendants, who had undertaken to store furniture, sub-contracted for the storage with a third party without the bailor's knowledge). Cf *Shaw & Co v Symmons & Sons* [1917] 1 KB 799 (goods destroyed by fire when detained in breach of contract); and see paras 19, 24, 33 ante.
- 23 *Jackson v Mayfair Window Cleaning Co Ltd* [1952] 1 All ER 215 at 218. See also *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107. See further the Torts (Interference with Goods) Act 1977 s 2(2); and TORT vol 45(2) (Reissue) para 543 et seq. See also para 87 post; and CIVIL PROCEDURE.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/40. Limitation of bailee's liability.

40. Limitation of bailee's liability.

The bailee may limit or relieve himself from his common law liability¹ by special conditions in the contract²; but in cases of ambiguity these will be strictly construed³. They will be held not to exempt him from responsibility for losses due to his negligence unless the words used are clear and adequate for the purpose⁴.

The burden is on the bailee to prove⁵ that the loss or damage to the chattel occurred without any neglect, default or misconduct on his part or on the part of any servant to whom he may have delegated his duty⁶, or that it occurred by negligence of a kind from liability for which he is exempted⁷. The more destructive or restrictive of rights an exempting condition is, the clearer must be the indication, by some sufficiently prominent or explicit notice, that the bailor is to be bound by it⁸.

The construction of exemption clauses in cases of misdelivery may give rise to special difficulty⁹. Very carefully chosen words are required to protect a bailee from liability for misdelivery¹⁰. Unauthorised delivery ordinarily goes to the root of the relationship of bailor and bailee and may not be excused under the terms of a general exemption clause¹¹. The question depends ultimately, however, upon the language of the clause. If it is clear and specific enough to apply to the particular breach (however severe) the bailee will be protected. There is no rule of law which prevents an exclusion or limitation clause from being given effect, irrespective of its language, simply by virtue of the severity of the breach or its consequences¹².

Where conditions are relied on the custodian must show that the bailor knew or should reasonably have known of them and can thus be taken to have assented to them; the mere fact that they are the custodian's usual terms will not be sufficient¹³. Moreover, a bailee may deprive himself of the right to rely on a contractual exemption by going outside the purview of the contract¹⁴ or by innocent misrepresentation¹⁵.

1 The exclusion and restriction of liability for negligence and breach of contract is now subject to the provisions of the Unfair Contract Terms Act 1977: see CONTRACT vol 9(1) (Reissue) para 790 et seq.

2 *Van Toll v South Eastern Rly Co* (1862) 12 CBNS 75 at 84 per Erle CJ; *Harris v Great Western Rly Co* (1876) 1 QBD 515 (approved in *Gibaud v Great Eastern Rly Co* [1921] 2 KB 426, CA); *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; *Barton v Ruislip Dog Sanatorium Ltd* (1917) 33 TLR 458; *Reynolds v Boston Deep Sea Fishing and Ice Co Ltd* (1922) 38 TLR 429, CA; *Rutter v Palmer* [1922] 2 KB 87, CA; *Orchard v Connaught Club Ltd* (1930) 46 TLR 214; *HMF Humphrey Ltd v Baxter, Hoare & Co Ltd* (1933) 149 LT 603 (buyer of goods stored in warehouse bound by conditions of contract made between warehouseman and seller); *British Traders and Shippers Ltd v Ubique Transport and Motor Engineering Co (London) Ltd and Port of London Authority* [1952] 2 Lloyd's Rep 236 (where the bailees were held not to be relieved from liability); *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA; *Spriggs v Sotheby Parke Bernet & Co Ltd* [1986] 1 Lloyd's Rep 487, CA. Cf *Calico Printers' Association Ltd v Barclays Bank* (1931) 145 LT 51, CA. See also note 11 infra; and see *L Harris (Harella) Ltd v Continental Express Ltd and Burn Transit Ltd* [1961] 1 Lloyd's Rep 251. As to whether a sub-bailee can rely on an exempting condition made between the bailor and the bailee see *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 729, 731, 741, [1965] 2 All ER 725 at 733, 734, 740, CA; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164; *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] AC 324, [1994] 2 All ER 250, [1994] 1 Lloyd's Rep 593, PC; and para 41 post. As to the incorporation and construction of conditions see *Richardson, Spence & Co and Lord Gough Steamship Co v Rowntree* [1894] AC 217, HL; *Parker v South Eastern Rly Co, Gabell v South Eastern Rly Co* (1877) 2 CPD 416; *Lyons & Co v Houghton* [1915] 1 KB 489 at 502, DC, per Atkin J; *Jarl Trä AB v Convoys Ltd* [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep 459.

3 This is on the general principle that a person wishing to exempt himself from his legal liabilities must do so in express and unambiguous terms: see *Price & Co v Union Lighterage Co* [1903] 1 KB 750 (affd [1904] 1 KB 412, CA); *Rutter v Palmer* [1922] 2 KB 87 at 94, CA; *Producer Meats (North Island) Ltd v Thomas Borthwick & Sons (Australia) Ltd* [1964] 1 NZLR 700, [1965] 1 Lloyd's Rep 130, NZ CA, where the words used were held to be

inadequate to exempt the respondents from negligence. The courts should not manufacture ambiguity, and should endeavour to give effect to commercial contracts in accordance with their ordinary, common-sense meaning: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 851, [1980] 1 All ER 556 at 568, HL, per Lord Diplock.

4 *Canada Steamship Lines Ltd v R* [1952] AC 192 at 207-208, [1952] 1 All ER 305 at 309, PC; *Olley v Marlborough Court Ltd* [1949] 1 KB 532, [1949] 1 All ER 127, CA; *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M & I) Ltd and Coubro & Scrutton (Riggers and Shipwrights) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42, CA; and see CONTRACT. Cf *Chapelton v Barry UDC* [1940] 1 KB 532, [1940] 1 All ER 356, CA. See also the text to note 7 infra.

5 He provided that the case against him has not been pleaded solely in negligence: see *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 at 125, [1956] 1 WLR 461 at 466, CA, per Denning LJ. See para 43 note 3 post.

6 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 726, [1965] 2 All ER 725 at 731, CA, per Lord Denning MR; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, 3 All ER 337, PC. For examples of the discharge or non-discharge of the burden on particular facts, see *Coopers Payen Ltd v Southampton Container Terminal Ltd* [2003] EWCA Civ 1223, [2004] 1 Lloyd's Rep 331; *Arlington Productions Ltd v Pinewood Studios Ltd* [2004] EWHC 32, [2004] All ER (D) 168 (Jan), QB.

7 *Woolmer v Delmer Price Ltd* [1955] 1 QB 291, [1955] 1 All ER 377 (unexplained loss); approved in *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA. See also *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA, The Torenia* [1983] 2 Lloyd's Rep 210; *Euro Cellular (Distribution) plc v Danzas Ltd* [2004] EWHC 11 (Comm), [2004] All ER (D) 42 (Jan).

8 *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA. See also *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA; *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197; *Jarl Trä AB v Convoys Ltd* [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep 459.

9 *Sydney City Council v West* [1966] ALR 538, Aust HC (where it was held by a majority of three to two that the bailee was not exempted from negligent misdelivery; three judges considered that exemption could have been achieved by adequate wording, and the two judges in the minority considered that it had been; two of the judges in the majority held that unauthorised delivery, being not a mere act of negligence in relation to some act authorised by the bailment contract, precluded the bailee from relying on the exemption clause). See *Hollins v J Davy Ltd* [1963] 1 QB 844, [1963] 1 All ER 370. See also para 41 post.

10 *Ashby v Tolhurst* [1937] 2 KB 242 at 258, [1937] 2 All ER 837 at 847, CA, per Scott LJ. See *Hollins v J Davy Ltd* [1963] 1 QB 844, [1963] 1 All ER 370, where the words were held to be sufficient to exempt the bailee from liability for innocent misdelivery. See also *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] AC 324, [1994] 2 All ER 250, [1994] 1 Lloyd's Rep 593, PC; *Lotus Cars Ltd v Southampton Cargo Handling plc, The Rigoletto* [2000] 2 All ER (Comm) 705, [2000] 2 Lloyd's Rep 532, CA; *Motis Exports Ltd v Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep 211, [2000] 1 All ER (Comm) 91, CA. See further para 41 post.

11 *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576 at 587-588, [1959] 3 All ER 182 at 185, PC. See also para 41 post.

12 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101, [1983] 1 WLR 964, HL; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL. See also the Unfair Contract Terms Act 1977 s 9(1); the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended); and CONTRACT vol 9(1) (Reissue) paras 805, 829. See further para 41 post.

13 *Walker v Jackson* (1842) 10 M & M 161 at 170; *Long v District Messenger and Theatre Ticket Co* (1916) 32 TLR 596. See also *Victoria Fur Traders Ltd v Roadline (UK) Ltd and British Airways Board* [1981] 1 Lloyd's Rep 570, DC (standard terms of bailee not known to owners and not incorporated into contract with owners' agent); *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197.

14 *Martin v N Negin Ltd* (1945) 172 LT 275, CA.

15 *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805, [1951] 1 All ER 631, CA. As to the burden of proof, see *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA; *Euro Cellular (Distribution) plc v Danzas Ltd* [2004] EWHC 11 (Comm), [2004] All ER (D) 42 (Jan).

UPDATE

40 Limitation of bailee's liability

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/41. Sub-bailment.

41. Sub-bailment.

A sub-bailee is a person to whom the actual possession of goods is transferred by someone who is not himself the owner of goods, but who has a present right to possession of them as bailee of the owner¹. When the sub-bailee accepts possession of the goods he thereby assumes the obligations of a bailee towards the original bailor². The nature of these obligations will, as in the case of an ordinary bailment, vary according to the circumstances in which and the purposes for which the goods are delivered³. Thus if the sub-bailment is for reward, the sub-bailee will owe to the bailor all the duties of a bailee for reward⁴. The bailor has a right to make a claim against the sub-bailee for breach of any of his duties either if the bailor has the right to immediate possession of the goods or if they are permanently injured or lost⁵. The sub-bailee also owes, concurrently, the same duties to the original bailee⁶, whose obligations to the bailor are not extinguished by the sub-bailment⁷. The relationship between the bailor and the sub-bailee exists independently of any contract between them, or of any attornment⁸.

The bailor is bound by any exclusion or limitation clause⁹ contained in the sub-bailment, irrespective of any contract between him and the sub-bailee, if he has expressly or impliedly consented to the making of the sub-bailment on such terms¹⁰. The bailor may also be bound by any exclusion or limitation clause contained in the sub-bailment, to the imposition of which he has not expressly or impliedly consented, if the exclusion or limitation clause represents an essential part of the sub-bailee's consideration for entering into the sub-bailment, at least if the duty which the bailor seeks to enforce against the sub-bailee would not have arisen but for the fact of the sub-bailment¹¹. However, it now appears that, whereas, someone who voluntarily takes another person's goods into his custody holds them as bailee of that person (the owner) even if this is done without the owner's consent, the bailee can invoke the terms of the sub-bailment under which he received the goods from an intermediate bailee (the carrier) as qualifying his responsibility only if the owner actually (or perhaps ostensibly) consented to such terms¹².

1 *China-Pacific SA v Food Corpn of India, The Winson* [1982] AC 939 at 959, [1981] 3 All ER 688 at 693, HL, per Lord Diplock; and see *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561 per Tuckey LJ. Under a sub-bailment, the original bailee remains responsible for the goods as a bailee and retains a right to the possession of the goods when the sub-bailment expires: cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA, where the intermediate carriers failed to adduce evidence of any right to resume possession of the goods from the sub-carriers. Contrast the substitutional bailment, under which the original bailee withdraws from the bailment relationship once he has conferred possession upon the incoming bailee, and the incoming bailee takes his place as the direct bailee of the bailor. This variety of bailment is illustrated by the position of ship-owners once the cargo is off-loaded on to salvage vessels provided by a salvor to carry the cargo to a place of safety: *China-Pacific SA v Food Corpn of India, The Winson* supra. There is a third variety of extended bailment, sometimes known as the quasi-bailment, under which the intermediate party does not personally obtain possession of the goods before engaging the ultimate bailee to take possession: see *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197; *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] AC 324, [1994] 2 All ER 250, [1994] 1 Lloyd's Rep 593, PC; *P & O Trans European Ltd v Wincanton Ltd* [2001] EWCA Civ 227, [2001] All ER (D) 174 (Feb), CA. See also Palmer *Bailment* (2nd Edn, 1991) ch 20; [1983] Current Legal Problems 93.

2 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825, [1970] 1 WLR 1262, PC; *China-Pacific SA v Food Corp'n of India, The Winson* [1982] AC 939 at 957-959, [1981] 3 All ER 688 at 692-693, HL, per Lord Diplock ('A person who holds possession of goods as sub-bailee of an original direct bailee also owes some duty of care towards the owner'). In most cases, it would appear that the sub-bailee's lack of knowledge as to the identity of the original bailor does not affect his obligations towards him: *Balsamo v Medici* [1984] 2 All ER 304 at 310-311, [1984] 1 WLR 951 at 959 per Walton J. The fact that the sub-bailee acts as an independent contractor as agent for the bailee does not prevent a sub-bailment from arising: see *Lotus Cars Ltd v Southampton Cargo Handling plc, The Rigoletto* [2000] 2 All ER (Comm) 705, [2000] 2 Lloyd's Rep 532, CA; and see *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA. It has been held on particular facts that the relationship between bailor and sub-bailee could not be described as based on agreement: see *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502 at 511, [1992] 2 All ER 450 at 457, CA, per Bingham LJ. But the relationship of the ultimate bailee and the original bailor may be contractual in particular circumstances (*Sandeman Coprimar SA v Transitos y Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, [2003] 2 Lloyd's Rep 172) or it may be affected by some direct agreement, understanding or other communication falling short of contract between those parties: *European Gas Turbines v MSAS Cargo International Inc* (unreported, 26 May 2000), QB. Moreover, the doctrine of sub-bailment on terms may (independently of contract) enable the enforcement of positive obligations between the parties to the sub-bailment, and not merely immunities from liability: *Sandeman Coprimar SA v Transitos y Integrales SL* supra.

3 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 731, [1965] 2 All ER 725 at 734, CA, per Diplock LJ.

4 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 729, [1965] 2 All ER 725 at 733, CA, per Lord Denning MR. As to the nature of such duties see para 39 ante. They might include the normal bailee's common law estoppel on pleading *jus tertii* and denying the bailor's title: *The Hamburg Star* [1994] 1 Lloyd's Rep 399, QB (point arguable); and see as to the bailee's estoppel generally para 82 post. See also *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535 (gratuitous sub-bailee).

5 See *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 728-729, [1965] 2 All ER 725 at 733, CA, per Lord Denning MR; *Moukataff v British Overseas Airways Corp'n* [1967] 1 Lloyd's Rep 396 at 415 per Browne J.

6 See Pollock and Wright on Possession p 169. See also *The Winkfield* [1902] P 42, CA, cited in *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 728-729, [1965] 2 All ER 725 at 732-733, CA, per Lord Denning MR.

7 *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825 at 829, [1970] 1 WLR 1262 at 1267, PC; Palmer *Bailment* (2nd Edn, 1991) pp 1345-1365. See further *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197 (intermediate party under quasi-bailment held liable for defaults of ultimate bailee). The position will be otherwise under a substitutional bailment, where the original bailee withdraws from the relationship and the incoming bailee takes his place as the direct bailee of the original owner: see note 1 supra.

8 *Gilchrist Watt and Sanderson Pty Ltd v York Products Ltd* [1970] 3 All ER 825, [1970] 1 WLR 1262, PC; *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502 at 511, [1992] 2 All ER 450 at 457, CA, per Bingham LJ. Cf *Compania Portorrafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 404-406, CA, per Bingham LJ.

9 The principle appears to be confined to terms which purport to exclude or restrict the liability of the sub-bailee: see *The Forum Craftsman* [1985] 1 Lloyd's Rep 291, CA. Although the party seeking to rely on an exemption clause usually must show that the loss or damage to the other party is within the scope of the clause (see the text to notes 10-11 infra), the burden of proof rests on the party seeking to establish the liability: see para 40 ante.

10 *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, following *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 729-730, [1965] 2 All ER 725 at 733, CA, per Lord Denning MR (obiter); *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA, The Kapetan Markos NL (No 2)* [1987] 2 Lloyd's Rep 321 at 336, CA, per Nicholls LJ, and at 340 per Dillon LJ; *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] AC 324, [1994] 2 All ER 250, [1994] 1 Lloyd's Rep 593, PC; *East West Corp'n v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700. The owner against whom this defence is invoked must have bailed the goods to the original bailee before the original bailee bailed them to the defendant; unless the defendant subsequently attorns to the new owner (as to which see para 84 post), the defendant cannot invoke the defence against someone who becomes the owner of the goods after the goods have been bailed to the defendant: *Compania Portorrafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, CA. In *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* supra at 168, Steyn J left open the question whether a mere ostensible authority in the original bailee to sub-bail the goods on certain exculpatory terms would suffice to enable the sub-bailee to invoke those terms in a claim against him by the sub-bailee. But cf note 11 infra.

11 *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215. The validity of this principle was left open in *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 168 per Steyn J, but the principle appears to have been approved in *Compania Portorafi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, CA. But note the qualification stated in note 10 supra which would appear to apply equally to this principle. See further *Swiss Bank Corp v Brinks-MAT Ltd* [1986] 2 Lloyd's Rep 79 at 98 per Bingham J. See also Palmer *Bailment* (2nd Edn, 1991) pp 1631-1645; and the text to note 12 infra. Note the principle that a third party to a contract cannot be subjected to the burden of an exemption clause although under the Contracts (Rights of Third Parties) Act 1999 s 1(4) if a third party wishes to enforce a term conferring a benefit on him he can only do so subject to and in accordance with any other terms of the contract (which may impose burdens and conditions upon the enjoyment of any benefit): see CONTRACT vol 9(1) (Reissue) para 822.

12 *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] AC 324, [1994] 2 All ER 250 at 262, PC, disapproving *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215 (see note 11 supra). These principles were applied in *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48, Ct; and *Spectra International plc v Haysoak Ltd* [1998] 1 Lloyd's Rep 162, CA. See also *Lukoil-Kaliningradmorneft plc v Tata Ltd* [1999] All ER (D) 413, CA; *Lotus Cars Ltd v Southampton Cargo Handling plc, The Rigoletto* [2000] 2 All ER (Comm) 705, [2000] 2 Lloyd's Rep 532, CA; *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2003] 2 All ER 885; *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, [2003] 2 Lloyd's Rep 172. However, see *The Mahkutai* [1996] AC 650, [1996] 3 All ER 502, [1996] 2 Lloyd's Rep 1, PC, where *KH Enterprise v Pioneer Container, The Pioneer Container* supra was distinguished; see also *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561 (delivery of stolen painting by alleged non-owner to auction house; semble, no sub-bailment between auction house and original owner in that, inter alia, original owner did not consent to possession on the part of either the auction house or other person to it).

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/42. Acts of employees.

42. Acts of employees.

The custodian bailee is responsible to the owner of the chattel entrusted to him both for the negligence of his agents or employees¹, and for their acts of fraud or other wrongful acts², provided that those acts were committed in the course of their employment³. Although such a custodian usually incurs no responsibility where an act of fraud or negligence is committed by a servant or agent not in the course of his employment or outside the scope of his authority⁴, the custodian may be liable if he was negligent in engaging the servant whose act occasioned the loss⁵.

1 *Randelson v Murray* (1838) 8 Ad & El 109. This includes the negligence of the bailor's servants if placed under the bailee's control: *AH Bull & Co v West African Shipping Agency and Lighterage Co* [1927] AC 686, PC; *GW Leggott & Son v CH Normanton & Son* (1928) 98 LJB 145; *L Harris (Harella) Ltd v Continental Express Ltd and Burn Transit Ltd* [1961] 1 Lloyd's Rep 251; contrast *Société Maritime Française v Shanghai Dock and Engineering Co Ltd* [1921] 2 AC 417n, PC. See also *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May); *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.

2 *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259 at 265; *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394; *Dyer v Munday* [1895] 1 QB 742, CA; *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796; *Aitchison v Page Motors Ltd* (1935) 154 LT 128; *Adams (Durham) Ltd and Day v Trust Houses Ltd* [1960] 1 Lloyd's Rep 380; *W Carsen & Co Ltd v Eastern Canada Stevedoring Co* [1962] 2 Lloyd's Rep 209, Ont CA. Cf para 59 post.

3 *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; and see *United Africa Co Ltd v Saka Owoade* [1955] AC 130, [1957] 3 All ER 216, PC; *Rustenburg Platinum Mines Ltd v South African Airways* [1979] 1 Lloyd's Rep 19, CA (obiter); *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83,

[2003] QB 1509, [2003] 2 All ER 700. It is commonly stated that the employee must be one to whom the bailee has entrusted the goods: *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* supra; *Morris v CW Martin & Sons Ltd* supra; *Swiss Bank Corp v Brinks-MAT Ltd* [1986] 2 Lloyd's Rep 79. See also the cases cited in note 2 supra and see *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215; cf *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL.

4 Cf *Swiss Bank Corp v Brinks-MAT Ltd* [1986] 2 Lloyd's Rep 79; and see *Irving v Post Office* [1987] IRLR 289, CA; *Heasmans v Clarity Cleaning Co Ltd* [1987] ICR 949, CA. See also para 39 note 17 ante. It is to be observed that, in *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796, the Lord President reserved for consideration the general question whether the misconduct of the custodian's servant can ever be a defence to the custodian in view of *Lloyd v Grace, Smith & Co* [1912] AC 716, HL. See further *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717, [1986] 2 All ER 385, HL. See also AGENCY vol 1 (2008) PARA 121 et seq; EMPLOYMENT.

5 *Williams v Curzon Syndicate Ltd* (1919) 35 TLR 475, CA. See also *Adams (Durham) Ltd and Day v Trust Houses Ltd* [1960] 1 Lloyd's Rep 380; *Nahhas v Pier House (Cheyne Walk) Management Ltd* (1984) 270 Estates Gazette 328.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/43. Onus of proof.

43. Onus of proof.

When a chattel entrusted to a custodian is lost, injured or destroyed, the onus of proof¹ is on the custodian to show that the injury did not happen in consequence of any neglect on his part, or on the part of his servants acting within the course of their employment², to use such care and diligence as a prudent or careful man would exercise in relation to the property³. If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred⁴. If a custodian declines either to produce the chattel entrusted to him when required to do so by the owner, or to explain how it has disappeared, the refusal amounts prima facie to evidence of breach of duty on his part, and throws on him the onus of showing that he exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing⁵.

1 See also para 40 text and notes 4-6 ante. The onus may shift: see *Brazier v Whelan* (1960) Times, 21 July (custody of racehorse which died from disease).

2 The onus extends to requiring the custodian to prove that the chattel was not stolen or otherwise maltreated by any servant of his to whom he had entrusted the chattel, or to whom he had delegated the whole or any part of his duty of care: see para 61 post.

3 *Mackenzie v Cox* (1840) 9 C & P 632; *Reeve v Palmer* (1858) 5 CBNS 84; *Phipps v New Claridge's Hotel Ltd* (1905) 22 TLR 49; *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 at 538-539, [1936] 3 All ER 696 at 701-702, CA; *Gutter v Tait* (1947) 177 LT 1, CA; *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA; *British Traders and Shippers Ltd v Ubique Transport and Motor Engineering Co (London) Ltd and Port of London Authority* [1952] 2 Lloyd's Rep 236 at 256; *WLR Traders (London) Ltd v British and Northern Shipping Agency Ltd and I Leftley Ltd* [1955] 1 Lloyd's Rep 554; *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA; *Transmotors v Robertson, Buckley & Co* [1970] 1 Lloyd's Rep 224 (failure to discharge onus); *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* (1990) Times, 7 March; *Fankhauser v Mark Dykes Pty Ltd* [1960] VR 376, Vict FC; *Hobbs v Petersham Transport Co Pty Ltd* (1971) 45 ALJ 356, Aust HC; *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May); *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; and see para 6 note 11 ante. As to misdelivery see *Becker v Lavender Ltd* (1946) 62 TLR 504; and cf *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442. If the bailee or his servants are guilty of negligence, and it is doubtful whether the negligence caused the loss or injury, the onus is on him to prove that it did not: *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; *Coldman v Hill* [1919] 1 KB 443, CA. Similarly, if he relies on an exemption, he must prove that the facts bring him within it: *Levison v Patent Steam Carpet Cleaning Co Ltd*

[1978] QB 69, [1977] 3 All ER 498, CA; *Euro Cellular (Distribution) plc v Danzas Ltd* [2004] EWHC 11 (Comm), [2004] All ER (D) 42 (Jan); *London and North Western Ry Co v JP Ashton & Co* [1920] AC 84, HL; cf para 15 ante. If the time of the loss is material to the question whether the bailee is liable, the bailee must prove when the loss occurred: *Re S Davis & Co Ltd* [1945] Ch 402 (liability of liquidator); *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779 (gratuitous bailment).

4 *Bullen v Swan Electric Engraving Co* (1907) 23 TLR 258, CA; *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 at 539, [1936] 3 All ER 696 at 702, CA; *Palmer Bailment* (2nd Edn, 1991) pp 785-786; approved in *Coopers Payen Ltd v Southampton Container Terminal Ltd* [2003] EWCA Civ 1223 at [28], [2004] 1 Lloyd's Rep 331 at [28] per Clarke LJ. See also paras 6 note 10, 15 note 10 ante.

5 See generally *Arlington Productions Ltd v Pinewood Studios Ltd* [2004] EWHC 32, [2004] All ER (D) 168 (Jan), QB; *Coopers Payen Ltd v Southampton Container Terminal Ltd* [2003] EWCA Civ 1223, [2004] 1 Lloyd's Rep 331; and see further *Platt v Hibbard* (1827) 7 Cowen 497 at 500 per Walworth J (US case). Contrast *HC Smith Ltd v Great Western Ry Co* [1922] 1 AC 178, HL (refusal to account for loss did not amount to proof of 'wilful misconduct' of defendants' servants within an exception to a clause exempting the defendants from liability).

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/44. Insurance.

44. Insurance.

A custodian is not ordinarily responsible to the owner of the chattel entrusted to him in case of its destruction by fire¹, unless he has deviated from the terms of the bailment or broken his duty of care, or undertaken some special contractual responsibility covering the particular event. If, however, he insures the chattel he has such an insurable interest in it that, as against the insurers, he is entitled to recover its full value². A custodian who recovers insurance money occupies the position of a trustee to the owner of the chattel covered by the insurance for its value, less his agreed or reasonable charges for warehousing; and after demand by the owner and refusal by the custodian to account for the proceeds, a claim will lie against him at the suit of the owner for money had and received³.

A custodian will be bound by an express undertaking to insure the goods and will be liable for loss suffered by the bailor in consequence of the custodian's failure to do so⁴. In the absence of such an express undertaking, however, it would appear that (otherwise, perhaps, than in exceptional cases⁵) none will be implied⁶.

1 *Sideways v Todd* (1818) 2 Stark 400 at 401 per Abbott J; *Maving v Todd* (1815) 4 Camp 225. See also the cases cited in para 39 note 16 ante.

2 *Waters and Steel v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870. See also *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; and *Re Routledge, ex p Bateman* (1856) 8 De GM & G 263. See further *Albacruz (Cargo Holders) v Albazero (Owners), The Albazero* [1977] AC 774 at 846, [1976] 3 All ER 129 at 136-137, HL, per Lord Diplock; *Feasey v Sun Life Assurance Company of Canada; Steamship Mutual Underwriting Association (Bermuda) Ltd v Feasey* [2003] EWCA Civ 885, [2003] 2 All ER (Comm) 587; *Palmer Bailment* (2nd Edn, 1991) ch 4, p 305; and DAMAGES vol 12(1) (Reissue) para 1102. The chattels destroyed must be covered by the terms of the policy: *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25. See further INSURANCE vol 25 (2003 Reissue) para 698 et seq.

3 *Sideways v Todd* (1818) 2 Stark 400. See also *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; *Re E Dibbens & Sons Ltd (in liquidation)* [1990] BCLC 577; *DG Finance Ltd v Scott and Eagle Star Insurance Co Ltd* (15 June 1995, unreported), CA; and DAMAGES vol 12(1) (Reissue) para 1102.

4 *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* (1990) Times, 7 March.

5 *Eastman Chemical International AG v NMT Trading Ltd and Eagle Transport Ltd* [1972] 2 Lloyd's Rep 25 (carriage).

6 *Koromvokis v Gregsons Auctioneers Pty Ltd* (20 November 1986, unreported), CA.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/45. Work to be done on chattels.

45. Work to be done on chattels.

The obligations of the custodian in the ordinary course of business are frequently varied and enhanced by the addition of a contract on his part to perform some act in connection with the chattels¹. This additional undertaking raises a series of obligations between the owner of the chattel and the bailee which are collateral to the bare obligation of safe custody. In such cases a further undertaking on the bailee's part will be implied to exercise capacity, care and fidelity in the conduct of the particular employment for which it was entrusted to him, for when a person undertakes for reward to perform any work he must be considered as bound to use a degree of diligence adequate to the performance of it².

1 See eg *Bevan v Waters* (1828) 3 C & P 520 (training horses); *Forth v Simpson* (1849) 13 QB 680 (training horses); *Curling v Wood* (1847) 16 M & W 628, Ex Ch (mooring a ship); *Reynolds v Boston Deep Sea Fishing and Ice Co Ltd* (1922) 38 TLR 429, CA (negligence in placing ship on slipway for repairs). See further SHIPPING AND MARITIME LAW.

2 Jones on Bailments (4th Edn, 1833) pp 98-99; and see para 68 et seq post.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/46. Measure of damages.

46. Measure of damages.

In a claim against a custodian for negligence, the measure of damages recoverable is generally the actual value of the lost chattel¹. However, the claimant may be able to recover any consequential damage flowing from the negligence which is not too remote in law, which may include damages for loss of use of the chattel², or profits lost from the destruction of it³. Damages for inconvenience or loss of enjoyment may also be awarded in certain circumstances⁴. In cases of deliberate wrongdoing towards the chattel, aggravated and exemplary damages may also be awarded⁵.

There is no implied undertaking on the part of a mere custodian to be answerable for consequential damages, and the simple deposit of chattels with him in the ordinary course of business raises no such notice by implication⁶.

1 This is subject to any contractual terms which may govern the dealings between the parties.

2 *Davis v Oswell* (1837) 7 C & P 804; *Mediana (Owners) v Comet (Owners, Master and Crew), The Mediana* [1900] AC 113, HL; *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA. As to damages where there is a fall in market value of the goods between the date of conversion and the date of their return see *Trailways Transport Ltd v Thomas* [1996] 2 NZLR 443, NZHC. As to damages where there is a loss flowing naturally and directly from the wrongful usurpation and conversion see *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq.

3 *Bodley v Reynolds* (1846) 8 QB 779; *France v Gaudet* (1871) LR 6 QB 199, Ex Ch; *The Arpad* [1934] P 189, CA. See also *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; *Trailways Transport Ltd v Thomas* [1996] 2 NZLR 443, NZ HC; *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209.

4 See para 86 post.

5 See para 86 post.

6 *Henderson v North Eastern Rly Co* (1861) 9 WR 519, 4 LT 216; *Building & Civil Engineering Holidays and Scheme Management Ltd v Post Office* [1966] 1 QB 247, [1965] 1 All ER 163, CA. As to the measure of damages recoverable by a bailor against a bailee see further *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 253-254, [1952] 1 All ER 796 at 800-801, CA, per Denning LJ; *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* (1990) Times, 7 March; and para 86 post. Compare the liability of a common carrier, who may be liable for loss of market or other consequential damage: see *Simpson v London and North Western Rly Co* (1876) 1 QBD 274; and CARRIAGE AND CARRIERS vol 7 (2008) PARAS 775, 777, 779.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(ii) Bailee's Obligations/47. Liability to distress.

47. Liability to distress.

Generally, the owner of goods who has given them to another for custody is protected from those goods being distrained for payment of rent in respect of the premises where the goods are stored¹.

At common law, chattels delivered to a person exercising a public trade to be carried, wrought, worked up or managed in the way of the trade are privileged from distress for rent due from the person in whose custody they are². Under the Law of Distress Amendment Act 1908, protection is given to the goods of strangers who have no interest in the land³. The Act allows such a bailor to recover the goods from the distraining landlord, or to recover their value⁴.

Statute governs the levying of distress upon livestock agisted on an agricultural holding⁵; and machinery and breeding stock upon such a holding which are not the property of the tenant are privileged from distress⁶.

1 See the Law of Distress Amendment Act 1908; and DISTRESS vol 13 (2007 Reissue) para 951 et seq.

2 See DISTRESS vol 13 (2007 Reissue) para 932. Examples of trades whose custodianship of goods has allowed privilege from distress to be claimed under this rule are warehousemen and wharfingers (*Miles v Furber* (1873) LR 8 QB 77; *Thompson v Mashiter* (1823) 1 Bing 283); factors or agents for sale (*Gilman v Elton* (1821) 3 Brod & Bing 75; *Findon v M'Laren* (1845) 6 QB 891); auctioneers, if on their own premises (*Williams v Holmes* (1853) 8 Exch 861) but otherwise not (*Lyons v Elliott* (1876) 1 QBD 210); and tradesmen who have to work on the goods (*Simpson v Hartopp* (1744) Willes 512; *Muspratt v Gregory* (1838) 3 M & W 677). Agisters and livery stable-keepers were probably on the same footing as warehousemen (*Parsons v Gingell* (1847) 4 CB 545, deciding against the privilege, being disapproved in *Miles v Furber* supra).

3 The subject to certain exceptions: see the Law of Distress Amendment Act 1908 s 4 (amended by the Consumer Credit Act 1974 s 192(3)(b), Sch 5 Pt I; the Agricultural Holdings Act 1986 s 100, Sch 14 para 4; the Agricultural Tenancies Act 1995 s 40, Schedule para 2; and the Access to Justice Act 1999 s 106, Sch 15 Pt V Table (3)).

4 See the Law of Distress Amendment Act 1908 s 1 (amended by the Perjury Act 1911 s 17, Schedule); and the Law of Distress Amendment Act 1908 s 2 (amended by the Access to Justice Act 1999 s 78(2), Sch 11 para 11).

5 For the meaning of 'agricultural holding' see the Agricultural Holdings Act 1986 s 1; and AGRICULTURAL LAND vol 1 (2008) PARA 323. As to agistment see ANIMALS vol 2 (2008) PARAS 721-723.

6 Ibid s 18. The Law of Distress Amendment Act 1908 does not apply to livestock within the Agricultural Holdings Act 1986 s 18: Law of Distress Amendment Act 1908 s 4(1) (as amended: see note 3 supra). See further AGRICULTURAL LAND vol 1 (2008) PARA 347.

UPDATE

47 Liability to distress

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 3--Law of Distress Amendment Act 1908 s 4 further amended: Civil Partnership Act 2004 Sch 27 para 3.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(iii) Bailee's Lien/48. When bailee's lien is available.

(iii) Bailee's Lien

48. When bailee's lien is available.

As a general rule a custodian for reward has, in the absence of some special agreement¹, no lien² for his charges upon the chattel entrusted to him for safe custody alone³, though, unless the terms of the contract exclude it⁴, he acquires a lien if, with the owner's consent, he expends labour and skill upon it for its improvement⁵. Nevertheless, by implication of law, wharfingers⁶, packers⁷, and possibly warehousemen⁸, have a general lien⁹ for their charges upon the chattels of their bailors, but in the case of wharfingers this implication may be rebutted in any particular district by local usage¹⁰. This general lien takes precedence of claims by the Crown¹¹, and the costs of defending it may be added to the security¹².

A general lien is presumed in the case of factors, bankers and stockbrokers, in the absence of a special contract¹³, which is always construed strictly against the claimant¹⁴; consequently such bailees may retain chattels or securities deposited with them, not only as security for the particular loan in respect of which they were so deposited, but also for a general balance of accounts¹⁵. A similar rule prevails, as part of the law merchant, in certain other trades, although in all such cases the custom establishing the existence of a general lien must be proved strictly¹⁶.

In the absence of a particular trade custom¹⁷, a specific lien on a particular chattel cannot be enlarged so as to include a general balance of account¹⁸. If in such a case, after the bailor demands the particular chattel and tenders the specific amount due on it, the bailee refuses to redeliver, not only is his lien gone¹⁹, but he is also liable to the true owner in a claim of trover for the tort of conversion²⁰. The mere demand by the bailee of a sum exceeding that which is really due to him does not usually dispense with the necessity of tender by the bailor of the amount actually due, especially if the bailee particularises his demand and claims to hold the chattel for the correct sum to which he is entitled, as well as for the excessive one²¹.

A bailee who keeps a chattel to enforce his lien on it cannot ordinarily charge for keeping it²².

At common law a railway authority has been held to have a lien on all chattels deposited with it for safe custody²³ for the amount of its reasonable charges. This lien applies not only against the person who actually deposited the chattel, but also against its true owner, or a third party, even though they may not have had privity with the original contracting parties²⁴.

A lien is exercisable against a bailor owner of a chattel in respect of work done to it by an artificer at the bailee's instance provided that the intermediate bailee had the authority of the bailor owner (whether express or implied) to create a lien in the particular events; it is possible that an ostensible or apparent authority will alternatively suffice for this purpose²⁵. Implied authority might be discoverable where the work is reasonably incidental to the bailee's reasonable use of the chattel, and the owner has not expressly excluded the bailee's authority to have the work done²⁶.

1 For an example of a special agreement see *Jowitt & Sons v Union Cold Storage Co* [1913] 3 KB 1. Contrast *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189, HL.

2 See *Rushforth v Hadfield* (1806) 7 East 224 (common carrier). See also *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 1 ALR 1, Aust HC; and para 77 post.

3 *Judson v Etheridge* (1833) 1 Cr & M 743; *Jackson v Cummins* (1839) 5 M & W 342; *Smith v Dearlove* (1848) 6 CB 132. Cf *Orchard v Rackstraw* (1850) 9 CB 698 (no lien by livery stable-keeper for money paid to veterinary surgeon at owner's request for attendance on horse).

4 *Forth v Simpson* (1849) 13 QB 680; *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621. See also *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA (title retention clause; held to be ineffective).

5 *Bevan v Waters* (1828) 3 C & P 520; *Scarfe v Morgan* (1838) 4 M & W 270. No lien attaches if the work is merely to maintain the chattel in its former condition: *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621; *Re Southern Livestock Producers Ltd* [1963] 3 All ER 801, [1964] 1 WLR 24. As to workman's lien see para 77 post.

6 *Bock v Gorrissen* (1860) 2 De GF & J 434 at 443 per Lord Campbell LC; *Spears v Hartly* (1800) 3 Esp 81.

7 *Re Witt, ex p Shubbrook* (1876) 2 Ch D 489, CA. Cf *K Chellaram & Sons (London) Ltd v Butlers Warehousing and Distribution Ltd* [1978] 2 Lloyd's Rep 412, CA (consolidators of goods; no lien); *Jarl Trä AB v Convoys Ltd* [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep 459 (handlers, storers and wharfingers of goods; limited lien).

8 *R v Humphery* (1825) M'Cle & Yo 173; but see *Leuckhart v Cooper* (1836) 3 Bing NC 99. See also *Re Catford, ex p Carr v Ford* (1894) 71 LT 584; *Hill & Sons v London Central Markets Cold Storage Co Ltd* (1910) 102 LT 715.

9 For the distinction between a general lien and a particular lien see LIEN vol 68 (2008) PARAS 817-818.

10 *Holderness v Collinson* (1827) 7 B & C 212. As to usages generally see CUSTOM AND USAGE vol 12(1) (Reissue) para 650 et seq.

11 *R v Humphery* (1825) M'Cle & Yo 173 (a decision which seems, however, to have turned on its special facts); *K Chellaram & Sons (London) Ltd v Butlers Warehousing and Distribution Ltd* [1978] 2 Lloyd's Rep 412 at 415, CA, per Megaw LJ.

12 *Moet v Pickering* (1878) 8 ChD 372 at 376, CA, per Cotton LJ.

13 *Bock v Gorrissen* (1860) 2 De G F & J 434. See AGENCY vol 1 (2008) PARA 114; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 860.

14 *Kinnear v Midland Rly Co* (1868) 19 LT 387.

15 *Re London and Globe Finance Corpn* [1902] 2 Ch 416; *Jones v Peppercorne* (1858) John 430.

16 *Re Spotten & Co, ex p Provincial Bank* (1877) 11 IR Eq 412. For cases where liquidation or bankruptcy avoids a general lien by contract see *Re Bushell, ex p Great Western Rly Co* (1882) 22 ChD 470, CA; *Wiltshire Iron Co v Great Western Rly Co* (1871) LR 6 QB 776; cf *George Barker (Transport) Ltd v Eynon* [1974] 1 All ER 900, [1974] 1 WLR 462, CA; and see generally LIEN. As to the law merchant see CUSTOM AND USAGE vol 12(1) (Reissue) para 662 et seq.

17 *Re Spotten & Co, ex p Provincial Bank* (1877) 11 IR Eq 412; *Bock v Gorrissen* (1860) 2 De G F & J 434; *Leuckhart v Cooper* (1836) 3 Bing NC 99.

18 *Jones v Tarleton* (1842) 9 M & W 675.

19 *Dirks v Richards* (1842) 4 Man & G 574; but see *Scarfe v Morgan* (1838) 4 M & W 270.

20 *The Norway* (1864) 3 Moo PCCNS 245 at 265. As to trover or conversion (included in wrongful interference with goods) see TORT vol 45(2) (Reissue) para 542 et seq.

21 *Scarfe v Morgan* (1838) 4 M & W 270. See also *Albemarle Supply Co Ltd v Hind & Co* [1928] 1 KB 307 at 318-319, CA, per Scrutton LJ.

22 *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338; and see *Delantera Amadora SA v Bristol Channel Shiprepairers Ltd and Swansea Dry Dock Co, The Katingaki* [1976] 2 Lloyd's Rep 372; *Rashtriya Chemicals and Fertilisers Ltd v Huddart Parker Industries Ltd, The Boral Gas* [1988] 1 Lloyd's Rep 342; *Morris v Beaconsfield Motors Ltd* [2001] EWCA Civ 1322; *Jarl Trä AB v Convoys Ltd* [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep 459. Aliter, perhaps where the bailee's retention of the chattel is predominantly for the benefit of the bailor: *China-Pacific SA v Food Corp of India, The Winson* [1982] AC 939 at 962-963, [1981] 3 All ER 688 at 696, HL, per Lord Diplock, and at 964 and 697 per Lord Simon of Glaisdale. Alternatively, of course, the contract might provide to that effect: cf *Morris v Beaconsfield Motors Ltd* supra per Rimer J.

23 *Van Toll v South Eastern Rly Co* (1862) 12 CBNS 75; *Pratt v South Eastern Rly Co* [1897] 1 QB 718, DC; *Roche v Cork, Blackrock and Passage Rly Co* (1889) 24 LR Ir 250; *Henderson v North Eastern Rly Co* (1861) 9 WR 519, 4 LT 216.

24 *Singer Manufacturing Co v London and South Western Rly Co* [1894] 1 QB 833 at 836, DC, per Mathew J, and at 837 per Collins J. In that case Collins J also based the lien upon the bailee's implied authority. In *Pennington v Reliance Motor Works Ltd* [1923] 1 KB 127 at 129, McCardie J expressed the view that the true ratio in *Singer Manufacturing Co v London and South Western Rly Co* supra was implied authority; but in *Cassils & Co and Sassoon & Co v Holden Wood Bleaching Co Ltd* (1914) 84 LJB 834 at 840-841, CA, Buckley LJ was of opinion that a common law lien apart from contract exists in favour of a carrier or innkeeper and that *Singer Manufacturing Co v London and South Western Rly Co* supra was rightly decided on this ground as well as on the ground of implied authority. Cf *Robins & Co v Gray* [1895] 2 QB 501, CA (innkeeper); *K Chellaram & Sons (London) Ltd v Butlers Warehousing and Distribution Ltd* [1978] 2 Lloyd's Rep 412, CA; *Jarl Trä AB v Convoys Ltd* [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep 459.

25 *Tappenden v Artus* [1964] 2 QB 185, [1963] 3 All ER 213, CA. See also LIEN vol 68 (2008) PARA 824.

26 *Tappenden v Artus* [1964] 2 QB 185, [1963] 3 All ER 213, CA (repairs to car to make it roadworthy).

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(1) HIRE OF CUSTODY/(iii) Bailee's Lien/49. Loss of lien.

49. Loss of lien.

The bailee's lien¹ is lost if the bailee loses possession of the chattel², or if he does anything amounting to a waiver³, or if the identity of the chattel is lost by intermixture or confusion with other chattels of a similar nature belonging to a different owner⁴. The bailee's assertion of a right to retain the chattel otherwise than by way of lien may operate as a waiver of the lien⁵.

As a general rule, a right of lien confers no right to sell the chattel⁶ unless that right is expressly conferred by statute⁷, and sale without right causes loss of the lien⁸.

1 See para 48 ante.

2 *Hutton v Bragg* (1816) 7 Taunt 14; *Pennington v Reliance Motor Works Ltd* [1923] 1 KB 127. Cf *Sweet v Pym* (1800) 1 East 4; *Dicas v Stockley* (1836) 7 C & P 587; *Barratt v Gough-Thomas* [1951] Ch 242, [1950] 2 All ER 1048, CA (solicitor); contrast *North Western Bank Ltd v John Poynter, Son and Macdonalds* [1895] AC 56, HL; *Albemarle Supply Co Ltd v Hind & Co* [1928] 1 KB 307, CA. See further LIEN.

3 *Mulliner v Florence* (1878) 3 QBD 484, CA, where the bailee sold the goods and thereby lost his lien; *Hill & Sons v London Central Markets Cold Storage Co Ltd* (1910) 102 LT 715; *Jarl Trä AB v Convoys Ltd* [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep 459.

4 *Grant v Humphery* (1862) 3 F & F 162.

5 *White v Gainer* (1824) 2 Bing 23 at 24 per Best CJ; *Weeks v Goode* (1859) 6 CBNS 367; *Boardman v Sill* (1808) 1 Camp 410n; *Dirks v Richards* (1842) 4 Man & G 574.

6 *Pothonier and Hodgson v Dawson* (1816) Holt NP 383 at 385 per Gibbs CJ; *Smart v Sandars* (1848) 5 CB 895; *Thames Iron Works Co v Patent Derrick Co* (1860) 1 John & H 93; *Bolwell Fibreglass Pty Ltd v Foley* [1984] VR 97, Vict SC.

7 Eg the statutory right of a bailee to dispose of uncollected goods: see para 80 post.

8 Cf *Mulliner v Florence* (1878) 3 QBD 484, CA, where an innkeeper was held not have a right to sell his guest's horses over which he had a lien. The law on this point was altered by the Innkeepers Act 1878: see LICENSING AND GAMBLING VOL 67 (2008) PARA 214. Some liens can be enforced by sale by means of a claim for such relief: Story's Commentaries on Equity Jurisprudence (3rd English Edn) s 1217. For the statutory power of a bailee to sell uncollected goods see para 80 post. The provisions of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, which restrict the exercise of certain remedies in relation to persons called up or volunteering for service in the armed forces, do not affect any right or power of a person to sell goods in his custody as a bailee if it is a right or power arising by reason of default in the payment of a debt: s 2(2) proviso (iv).

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(i) Nature of the Contract/50. Hire of chattels.

(2) HIRE OF CHATTELS

(i) Nature of the Contract

50. Hire of chattels.

Hire¹ is a class of bailment. It is a contract by which the hirer obtains the right to use the chattel hired in return for the payment to the owner of the price of the hiring². The general property in the chattel is not changed, but remains in the owner³, although upon delivery the hirer becomes legally possessed of the chattel hired⁴, so that if it is lent for a time certain, even the true owner is debarred during that time from resuming possession against the hirer's will and, should he do so, becomes liable in damages for the wrongful seizure⁵.

The contract must not be based on an immoral or illegal consideration, nor must it conduce to immorality or illegality⁶.

Statutory control is exercised over certain types of hiring⁷, and it is an offence, for example, to let on hire, or offer to let on hire, a motor cyclist's protective helmet which is not of a prescribed or authorised type⁸, and to hire, offer for hire or expose or have in one's possession for hire a flick knife or gravity knife⁹.

Certain terms are implied by statute into contracts for the hire of goods¹⁰. In the Supply of Goods and Services Act 1982, a 'contract for the hire of goods' means a contract, other than an excepted contract, under which one person bails or agrees to bail goods to another by way of hire¹¹. An excepted contract is either: (1) a hire-purchase agreement¹²; or (2) a contract under which goods are, or are to be, bailed in exchange for trading stamps on their redemption¹³. 'Goods' includes all personal chattels, other than things in action and money, and in particular includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before the transfer, bailment or hire concerned or under

the contract concerned¹⁴. For these purposes, a contract is a contract for the hire of goods whether or not services are provided or to be provided under the contract, and (subject to the provisions relating to excepted contracts¹⁵) whatever is the nature of the consideration for the bailment or agreement to bail by way of hire¹⁶.

Where a right, duty or liability would arise under a contract for the hire of goods by implication of law, it may generally¹⁷ be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract¹⁸. An express condition or warranty does not, however, negative a condition or warranty implied by the statute unless inconsistent with it¹⁹.

Nothing in the Supply of Goods and Services Act 1982 prejudices the operation of any other enactment or rule of law whereby any condition or warranty, other than one relating to quality or fitness, is to be implied into a contract for the hire of goods²⁰.

1 le *locatio conductio rei*: see para 2 text and note 9 ante.

2 Jones on Bailments (4th Edn, 1833) p 86; Pothier's *Contrat de Louage* s 1; 1 Domat book 1, tit 4, s 1, art 1. Cf *General Motors Acceptance Corp'n (UK) Ltd v IRC* [1987] STC 122, CA (cars supplied by finance company to dealers on sale or return; held not let on hire for the purposes of the Finance Act 1976 Sch 5 para 29(2)(c) (now repealed)). See also *Lloyds UDT Finance Ltd v Chartered Finance Trust Holdings plc (Britax International GmbH, Pt 20 defendant)* [2002] EWCA Civ 806, [2002] STC 956 (where a company was involved in the business of leasing motor vehicles to the public and there was consideration of the concept of hiring for the purposes of provisions (now repealed) of the Capital Allowances Act 1990).

3 As to the nature of the hirer's interest see *Australian Guarantee Corp'n Ltd v Ross* [1983] 2 VR 319 at 329-330 per Marks J, Vic Sup Ct, FC; Palmer *Bailment* (2nd Edn, 1991) ch 19; Story on Bailments (9th Edn, 1878) s 370a. Where the contract of hire is specifically enforceable the hirer may have an equitable interest in the chattel: *Bristol Airport plc v Powdrill* [1990] Ch 744 at 759, [1990] 2 All ER 493 at 502, CA, per Browne-Wilkinson V-C (obiter: lease of aircraft). As to special provisions where a motor vehicle has been bailed under a hire-purchase agreement or has been agreed to be sold under a conditional sale agreement, and before the property has become vested in the debtor, he makes a disposition to another person see the Hire-Purchase Act 1964 s 27(1) (as substituted); *Hitchens v General Guarantee Corp'n Ltd* [2001] All ER (D) 246 (Feb), CA, applying *Carlyle Finance Ltd v Pallas Industrial Finance* [1999] 1 All ER (Comm) 659, CA; and CONSUMER CREDIT vol 9(1) (Reissue) para 55. See also *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 All ER 215.

4 As to the right to terminate a written contract for breach of an oral promise made at the time it was entered into see *Quickmaid Rental Services Ltd v Reece (t/a Forge Service Station)* (1970) 114 Sol Jo 372, CA. See also *Hitchens v General Guarantee Corp'n Ltd* [2001] All ER (D) 246 (Feb), CA; and note 3 supra.

5 Supply of Goods and Services Act 1982 s 7. See para 53 post. See also Bac Abr Bailment C; *Lee v Atkinson and Brooks* (1609) Yelv 172; *Turner v Hardcastle* (1862) 11 CBNS 683. The measure of damages is the hirer's interest in the chattel: cf *Brierly v Kendall* (1852) 17 QB 937; *Chinery v Viall* (1860) 5 H & N 288; *Johnson (Assignee of Cumming) v Stear* (1863) 15 CBNS 330; *Halliday v Holgate* (1868) LR 3 Exch 299 at 301. In such a case the bailor may also be guilty of theft: *Rose v Matt* [1951] 1 KB 810, [1951] 1 All ER 361, DC.

6 The maxim *ex turpi causa non oritur actio* applies to this as to any other contract: *Pearce v Brooks* (1866) LR 1 Exch 213 at 217 per Pollock CB. See generally CONTRACT.

7 See para 51 post.

8 Road Traffic Act 1988 s 17(2), (5). The offence is punishable on summary conviction by a fine not exceeding level 3 on the standard scale: Road Traffic Offenders Act 1988 s 9, Sch 2 Pt I. See ROAD TRAFFIC vol 40(1) (2007 Reissue) para 640. As to the standard scale see para 10 note 7 ante.

9 Restriction of Offensive Weapons Act 1959 s 1(1) (amended by the Restriction of Offensive Weapons Act 1961 s 1; and the Criminal Justice Act 1988 s 46(2), (3)). The penalty on summary conviction is a fine not exceeding level 5 on the standard scale or imprisonment for a term not exceeding six months, or both: Restriction of Offensive Weapons Act 1959 s 1(1) (as so amended).

10 See the Supply of Goods and Services Act 1982 ss 7-10 (as amended); and para 53 et seq post. As to the modification of remedies for breach of statutory condition in non-consumer cases see s 10A (as added); and paras 54-56 post. Note also the definition of a consumer hire agreement in the Consumer Credit Act 1974 s 15 (as amended): see CONSUMER CREDIT vol 9(1) (Reissue) para 82. For the effect of the Consumer Credit Act 1974 on contracts of hire see CONSUMER CREDIT vol 9(1) (Reissue) paras 23 et seq, 95, 251 et seq.

11 Supply of Goods and Services Act 1982 s 6(1) (s 6(1), (3) amended by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(6)).

12 Supply of Goods and Services Act 1982 s 6(2)(a). 'Hire-purchase agreement' has the same meaning as in the Consumer Credit Act 1974 (see s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) para 95): Supply of Goods and Services Act 1982 s 18(1).

13 Ibid s 6(2)(b). 'Trading stamps' and 'redemption' have the same meanings as in the Trading Stamps Act 1964 (see s 10(1) (as amended)): Supply of Goods and Services Act 1982 s 18(1). As to trading stamps generally see VALUE ADDED TAX vol 49(1) (2005 Reissue) para 213.

14 Ibid s 18(1) (definition amended by the Sale and Supply of Goods Act 1994 s 6, Sch 1 para 2(b)).

15 Ie the Supply of Goods and Services Act 1982 s 6(2).

16 Ibid s 6(3) (as amended: see note 11 supra).

17 Ie subject to ibid s 11(2) (see the text and note 19 infra) and the Unfair Contract Terms Act 1977 (see CONTRACT vol 9(1) (Reissue) para 820 et seq).

18 Supply of Goods and Services Act 1982 s 11(1).

19 Ibid s 11(2).

20 Ibid s 11(3).

UPDATE

50-51 Hire of chattels, Control of hiring

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

50 Hire of chattels

TEXT AND NOTE 11--For 'an excepted contract' read 'a hire-purchase agreement': 1982 Act s 6(1) (amended by SI 2005/871).

TEXT AND NOTES 12, 13--1982 Act s 6(2) repealed: SI 2005/871.

NOTE 13--Definitions omitted: SI 2005/871.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(i) Nature of the Contract/51. Control of hiring.

51. Control of hiring.

The Secretary of State¹ may by order provide for imposing, in respect of the disposal, acquisition or possession of articles of any description under agreements for letting on hire,

such prohibitions or restrictions as appear to him to be required for restricting excessive credit².

It is an offence to hire, offer or agree to hire, expose or possess for hire any consumer goods³ which fail to comply with the general safety requirement contained in Part II of the Consumer Protection Act 1987⁴. The Secretary of State may make regulations for the purpose of ensuring compliance with the general safety requirement⁵. The regulations may prohibit the hiring or offering to hire or agreeing to hire any goods, or possessing any goods for hire, and contravention of the regulations is an offence⁶. In addition to the requirements under the Consumer Protection Act 1987, the General Product Safety Regulations 1994⁷ impose requirements in regard to the safety of products intended for consumers⁸ or likely to be used by consumers if such products are placed on the market by producers⁹ or supplied by distributors.

Special provision is made in relation to a television dealer¹⁰ who lets a television set on hire, arranges for a set to be so let by another dealer, or holds himself out as willing to engage in those activities¹¹.

1 The Emergency Laws (Re-enactments and Repeals) Act 1964 refers to the Board of Trade or the Secretary of State: see further TRADE AND INDUSTRY vol 97 (2010) PARA 802.

2 Emergency Laws (Re-enactments and Repeals) Act 1964 s 1(1) (amended by the Consumer Credit Act 1974 s 192(3)(a), Sch 4 Pt I para 23(1); and by virtue of the Secretary of State for Trade and Industry Order 1970, SI 1970/1537). The Control of Hiring and Hire-Purchase and Credit Sale Agreements (Revocation) Order 1982, SI 1982/1034 was made under the Emergency Laws (Re-enactments and Repeals) Act 1964 s 1 (as amended) revoking the Hire-Purchase and Credit Sale Agreements (Control) Order 1976, SI 1976/1135 (as amended) and the Control of Hiring Order 1977, SI 1977/770 (as amended), thereby bringing to an end the previously existing control of hiring, hire-purchase and credit sales agreements under that provision. For the effect of the Consumer Credit Act 1974 on contracts of hire see CONSUMER CREDIT vol 9(1) (Reissue) paras 23 et seq, 95, 251 et seq; see also para 50 ante.

3 'Consumer goods' means any goods ordinarily intended for private use or consumption, not being: (1) growing crops or things comprised in land by virtue of being attached to it; (2) water, food, feeding stuff or fertiliser; (3) gas which is, is to be or has been supplied by a person authorised to supply it by or under the Gas Act 1986 s 7A (as added and amended) or Sch 2A para 5 (as added) or under the Gas (Northern Ireland) Order 1996, SI 1996/275, art 8(1)(c) (see FUEL AND ENERGY vol 19(2) (2007 Reissue) para 807); (4) aircraft (other than hang-gliders) or motor vehicles; (5) controlled drugs or licensed medicinal products; or (6) tobacco: Consumer Protection Act 1987 s 10(7) (amended by the Gas Act 1995 s 16(1), Sch 4 para 15(1); and the Gas (Northern Ireland) Order 1996, SI 1996/275, art 7(1), Sch 6). As from a day to be appointed, this provision is amended so as to remove the reference to the Gas Act 1986 Sch 2A para 5 (as added): see the Consumer Protection Act 1987 s 10(7) (as so amended; and prospectively amended by the Utilities Act 2000 s 108, Sch 8). At the date at which this volume states the law, no such day had been appointed.

4 Consumer Protection Act 1987 ss 10(1), 46(1). The penalty on summary conviction is a fine not exceeding level 5 on the standard scale, or imprisonment for a term not exceeding six months, or both: s 10(6). As to the standard scale see para 10 note 7 ante.

As to the general safety requirement see s 10(2), (3) (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 533. This provides, in effect, that all goods must be reasonably safe having regard to all the circumstances, including those listed in s 10(2). The Consumer Protection Act 1987 Pt IV (ss 27-35) gives enforcement authorities powers to enforce the provisions of Pt II (ss 10-19) (as amended): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 555 et seq. For the effect of the Consumer Credit Act 1974 on contracts of hire see CONSUMER CREDIT vol 9(1) (Reissue) paras 23 et seq, 95, 251 et seq.

5 See *ibid* s 11 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 539. The Secretary of State may also issue prohibition notices and notices to warn: see s 13; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 539 et seq. As to the regulations made or having effect see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 539 et seq.

6 See *ibid* ss 12, 46(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 540.

7 *Ie* the General Product Safety Regulations 1994, SI 1994/2328 (as amended): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 565 et seq. Together with the Consumer Protection Act 1987, the General Product Safety Regulations 1994, SI 1994/2328 (as amended) comprise a code both for the protection of the public against unsafe products and for the protection of the interests of manufacturers and suppliers.

8 For the meaning of 'consumer' see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 565.

9 For the meaning 'producer' see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 565.

10 For the meaning of 'television dealer' see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 564.

11 See the Wireless Telegraphy Act 1967 s 2(1) (amended by the Broadcasting Act 1990 s 180, Sch 18 Pt II paras 1, 3; and the Deregulation (Wireless Telegraphy) Order 1986, SI 1996/1864, art 4(2)). Note that the Wireless Telegraphy Act 1967 s 2(1) (as amended) is subject to exceptions: see s 2(1A), (2) (s 2(1A) added, and s 2(2) amended, by the Deregulation (Wireless Telegraphy) Order 1986, SI 1996/1864, art 4). See further TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) para 564 et seq.

UPDATE

50-51 Hire of chattels, Control of hiring

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

51 Control of hiring

TEXT AND NOTES 3, 4--Repealed: SI 2005/1503.

NOTE 7--SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(i) Nature of the Contract/52. Nature of hire-purchase.

52. Nature of hire-purchase.

The contract of hire-purchase or, more accurately, the contract of hire with an option of purchase, is one under which the owner of a chattel lets it out on hire and undertakes to sell it to, or that it shall become the property of, the hirer, conditionally on his making a certain number of payments¹. It is a modern development in commercial life, and some rules with regard to bailments which were laid down before hire-purchase contracts were contemplated cannot logically be applied to them. Hire-purchase contains not only the element of bailment but also the element of sale². It is therefore treated elsewhere in this work³.

1 *Helby v Matthews* [1895] AC 471, HL; *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193, CA. As to special provisions where a motor vehicle has been bailed under a hire-purchase agreement or has been agreed to be sold under a conditional sale agreement and, before the property has become vested in the debtor, he makes a disposition to another person see the Hire-Purchase Act 1964 s 27(1) (as substituted); *Hitchens v General Guarantee Corp'n Ltd* [2001] All ER (D) 246 (Feb), CA, applying *Carlyle Finance Ltd v Pallas Industrial Finance* [1999] 1 All ER (Comm) 659, CA; and CONSUMER CREDIT vol 9(1) (Reissue) para 55. See also *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 All ER 215.

2 *Karflex Ltd v Poole* [1933] 2 KB 251 at 263-264 per Goddard J. See also *Chubb Cash Ltd v John Crilley & Son (a firm)* [1983] 2 All ER 294, [1983] 1 WLR 599, CA; *Chartered Trust v King* [2001] All ER (D) 310 (Feb), Ch.

3 See CONSUMER CREDIT vol 9(1) (Reissue) paras 1 et seq, 23 et seq, 95.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(ii) Owner's Obligations/53. Right to hire goods and quiet enjoyment.

(ii) Owner's Obligations

53. Right to hire goods and quiet enjoyment.

In a contract for the hire of goods¹ there is an implied condition on the part of the bailor² that in the case of a bailment he has the right to transfer possession of the goods by way of hire, and in the case of an agreement to bail that he will have such a right at the time of the bailment³. In such a contract there is also an implied warranty that the bailee⁴ will enjoy quiet possession of the goods for the period of the bailment except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the bailee before the contract is made⁵. These provisions do not affect the right of the bailor to repossess the goods under an express or implied term of the contract⁶.

1 For the meaning of 'contract for the hire of goods' see para 50 ante.

2 'Bailor', in relation to a contract for the hire of goods, means (depending on the context) a person who bails the goods under the contract, or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed: Supply of Goods and Services Act 1982 s 18(1).

3 Ibid s 7(1). See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 71.

4 'Bailee', in relation to a contract for the hire of goods, means (depending on the context) a person to whom the goods are bailed under the contract, or a person to whom they are to be so bailed, or a person to whom the rights under the contract of either of those persons have passed: ibid s 18(1).

5 Ibid s 7(2). See also *Lee v Atkinson and Brooks* (1609) Yelv 172; *Warman v Southern Counties Car Finance Corp'n Ltd* [1949] 2 KB 576, [1949] 1 All ER 711. Cf *European and Australian Royal Mail Co Ltd v Royal Mail Steam Packet Co* (1861) 30 LJCP 247. As to exclusion of these terms see the Supply of Goods and Services Act 1982 s 11; the Unfair Contract Terms Act 1977 s 7 (as amended); para 50 ante; and CONTRACT vol 9(1) (Reissue) para 820 et seq.

6 Supply of Goods and Services Act 1982 s 7(3). As to whether the hirer may be entitled to equitable relief from forfeiture see *On Demand Information plc (in administrative receivership) v Michael Gerson (Finance) plc* [2000] 4 All ER 734, [2000] 2 All ER (Comm) 513, [2001] 1 WLR 155, CA; and EQUITY vol 16(2) (Reissue) para 801 et seq. As to whether a threat to repossess goods from a lessee might constitute duress, see *Alf Vaughan & Co Ltd (in administrative receivership) v Royscot Trust plc* [1999] 1 All ER (Comm) 856, Ch (no duress where repossession lawful under terms of agreement and general law; pressure not illegitimate; position not affected by hirer's potential ability to invoke equitable relief against forfeiture).

UPDATE

53-56 Hire of chattels ... Right to hire goods and quiet enjoyment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(ii) Owner's Obligations/54. Correspondence with description.

54. Correspondence with description.

Where, under a contract for the hire of goods¹, the bailor² bails or agrees to bail the goods by description³, there is an implied condition that the goods will correspond with the description⁴. If under the contract the bailor bails or agrees to bail goods by reference to a sample as well as a description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description⁵.

Provision is made for exclusion of these terms⁶ and for modification of remedies for breach of statutory condition in non-consumer cases⁷.

1 For the meaning of 'contract for the hire of goods' see para 50 ante.

2 For the meaning of 'bailor' see para 53 note 2 ante.

3 Supply of Goods and Services Act 1982 s 8(1). A contract is not prevented from being a contract by description by reason only that, being exposed for supply, the goods are selected by the bailee: s 8(4). For the meaning of 'bailee' see para 53 note 4 ante.

4 Ibid s 8(2).

5 Ibid s 8(3).

6 See ibid s 11; the Unfair Contract Terms Act 1977; para 50 ante; and CONTRACT vol 9(1) (Reissue) para 820 et seq.

7 Where in the case of a contract for the hire of goods the bailee would have the right to treat the contract as repudiated by reason of a breach on the part of the bailor of a term implied by the Supply of Goods and Services Act 1982 ss 8, 9 (see para 55 post) or s 10(2)(a) or (b) (see para 56 post) but the breach is so slight that it would be unreasonable for him to do so, then, if the bailor does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty: s 10A(1) (s 10A added by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(9)). The Supply of Goods and Services Act 1982 s 10A (as added) applies unless a contrary intention appears in, or is to be implied from, the contract: s 10A(2) (as so added). It is for the bailor to show that a breach is so slight as indicated in s 10A(1) (as added): s 10A(3) (as so added). 'Dealing as consumer' is to be construed in accordance with the Unfair Contracts Act 1997 Pt I (ss 1-14) (as amended) (see CONTRACT vol 9(1) (Reissue) para 820 et seq): see the Supply of Goods and Services Act 1982 s 18(4) (added by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(10)). As to conditions and warranties see also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 62 et seq.

UPDATE

53-56 Hire of chattels ... Right to hire goods and quiet enjoyment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(ii) Owner's Obligations/55. Satisfactory quality.

55. Satisfactory quality.

Except as otherwise provided¹ and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods bailed under a contract for the hire of goods².

Where, under such a contract, the bailor³ bails goods in the course of a business⁴, there is an implied condition that the goods supplied under the contract are of satisfactory quality⁵. This implied condition, however, does not extend to any matter making the quality of goods unsatisfactory: (1) which is specifically drawn to the bailee's attention before the contract is made; (2) where the bailee examines the goods before the contract is made, which that examination ought to reveal; or (3) where the goods are bailed by reference to a sample⁶, which would have been apparent on a reasonable examination of the sample⁷.

Where, under a contract for the hire of goods, the bailor bails goods in the course of a business⁸ and the bailee, expressly or by implication, makes known to the bailor in the course of negotiations conducted by him in relation to the making of the contract, or to a credit-broker⁹ in the course of negotiations conducted by that broker in relation to goods sold by him to the bailor before forming the subject matter of the contract, any particular purpose for which the goods are being bailed¹⁰, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied¹¹. This provision does not apply, however, where the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor or person by whom the antecedent negotiations are conducted¹².

An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the hire of goods¹³.

The provisions described above apply to a bailment by a person who in the course of a business is acting as agent for another as they apply to a bailment by a principal in the course of a business, except where that other is not bailing in the course of a business and either the bailee knows that fact or reasonable steps are taken to bring it to the bailee's notice before the contract concerned is made¹⁴.

Provision is made for the exclusion of these terms¹⁵ and for modification of remedies for breach of statutory condition in non-consumer cases¹⁶.

1 le by the Supply of Goods and Services Act 1982 s 9 (as amended) (see the text and notes *infra*), s 10 (as amended) (see para 56 post).

2 Ibid s 9(1). For the meaning of 'contract for the hire of goods' see para 50 ante.

3 For the meaning of 'bailor' see para 53 note 2 ante.

4 'Business' includes a profession and the activities of any government department or local or public authority: Supply of Goods and Services Act 1982 s 18(1).

5 Ibid s 9(2) (substituted by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(7)). For these purposes and for the purposes of the Supply of Goods and Services Act 1982 s 10 (as amended) (see para 56 post), goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the consideration for the bailment (if relevant) and all other relevant circumstances: s 9(2A) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(7)). If the bailee deals as consumer, the relevant circumstances mentioned in the Supply of Goods and Services Act 1982 s 9(2A) (as added) include any public statements on the specific characteristics of the goods made about them by the bailor, the producer or his representative, particularly in advertising or on labelling: s 9(2B) (s 9(2B)-(2D) added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 10). A public statement is not by virtue of the Supply of Goods and Services Act 1982 s 9(2B) (as added) a relevant circumstance for the purposes of s 9(2A) (as added) in the case of a contract for the hire of goods, if the bailor shows that: (1) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement; (2) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained

anything which was incorrect or misleading, it had been corrected in public; or (3) the decision to acquire the goods could not have been influenced by the statement: s 9(2C) (as so added). The provisions of s 9(2B), (2C) (as added) do not prevent any public statement from being a relevant circumstance for the purposes of s 9(2A) (as added) (whether or not the bailee deals as consumer) if the statement would have been such a circumstance apart from those provisions: s 9(2D) (as so added). For the meaning of 'bailee' see para 53 note 4 ante. 'Consumer' means any natural person who, in the contracts covered by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, is acting for purposes which are outside his trade, business or profession: reg 2.

6 As to samples see para 56 post.

7 Supply of Goods and Services Act 1982 s 9(3) (substituted by the Sale and Supply of Goods Act 1994 Sch 2 para 6(7)).

8 See note 4 supra.

9 'Credit-broker' means a person acting in the course of a business of credit-brokerage carried on by him: Supply of Goods and Services Act 1982 s 18(1). 'Credit-brokerage' means the effecting of introductions: (1) of individuals desiring to obtain credit to persons carrying on any business so far as it relates to the provision of credit; or (2) of individuals desiring to obtain goods on hire to persons carrying on a business which comprises or relates to the bailment of goods under a contract for the hire of goods; or (3) of individuals desiring to obtain credit, or to obtain goods on hire, to other credit-brokers: s 18(1).

10 Ibid s 9(4).

11 Ibid s 9(5). Proof that the chattel suffered a defect under s 9(5) might disable the lessor from relying on an express indemnity in the hire agreement: see *Blackpool Ladder Centre Ltd v BWB Partnership* [2000] All ER (D) 1802 (Nov), CA. At common law, it has been held that, in the case of a hiring of a specific motor vehicle, the lessor's obligation to provide a vehicle which is reasonably fit for its purpose is not a continuing obligation but need be satisfied only at the commencement of the hiring: *UCB Leasing Ltd v Holtom* [1987] RTR 362, CA (but Balcombe LJ suggested (at 375) that the position may be otherwise in relation to the hiring of a single item of unspecific domestic equipment such as a gas stove). See also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 89.

12 Supply of Goods and Services Act 1982 s 9(6).

13 Ibid s 9(7). See also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 88.

14 Ibid s 9(8).

15 See *ibid* s 11; the Unfair Contract Terms Act 1977 s 7 (as amended); para 50 ante; and CONTRACT vol 9(1) (Reissue) para 820 et seq.

16 See the Supply of Goods and Services Act 1982 s 10A (as added); para 54 note 7 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 76, 89-90, 96.

UPDATE

53-56 Hire of chattels ... Right to hire goods and quiet enjoyment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(ii) Owner's Obligations/56. Sample.

56. Sample.

Where, under a contract for the hire of goods¹, the bailor² bails or agrees to bail the goods by reference to a sample³ there is an implied condition: (1) that the bulk will correspond with the

sample in quality⁴; and (2) that the bailee⁵ will have a reasonable opportunity of comparing the bulk with the sample⁶; and (3) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample⁷.

Provision is made for the exclusion of these terms⁸ and for modification of remedies for breach of statutory condition in non-consumer cases⁹.

1 For the meaning of 'contract for the hire of goods' see para 50 ante.

2 For the meaning of 'bailor' see para 53 note 2 ante.

3 For this purpose, a bailor bails or agrees to bail goods by reference to a sample where there is an express or implied term to that effect in the contract concerned: Supply of Goods and Services Act 1982 s 10(4).

4 Ibid s 10(2)(a).

5 For the meaning of 'bailee' see para 53 note 4 ante.

6 Supply of Goods and Services Act 1982 s 10(2)(b).

7 Ibid s 10(2)(c) (amended by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(8)(a)). 'Unsatisfactory' is to be construed in accordance with the Supply of Goods and Services Act 1982 s 9 (as amended): see para 55 ante. See also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 88-92.

8 See ibid s 11; the Unfair Contract Terms Act 1977 s 7 (as amended); para 50 ante; and CONTRACT vol 9(1) (Reissue) para 820 et seq.

9 See the Supply of Goods and Services Act 1982 s 10A (as added); para 54 note 7 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 76, 89-90, 96.

UPDATE

53-56 Hire of chattels ... Right to hire goods and quiet enjoyment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(ii) Owner's Obligations/57. Repair of chattel.

57. Repair of chattel.

Where the owner has agreed with the hirer to keep the chattel lent in proper repair¹, the owner is entitled to resume possession of it for the limited purpose of executing repairs². It is said that the hirer, if actually inconvenienced thereby, is entitled to an allowance or reduction from the rent for the period during which he has been deprived of the use of the chattel³, but this probably depends on the nature of the thing itself and the inferences to be drawn from the terms of the contract and the surrounding circumstances.

An owner's liability to repair may be discharged by a party to whom he assigns the chattel⁴.

1 This may be implied from the nature of the contract: *Sutton v Temple* (1843) 12 M & W 52 at 60, where Lord Abinger said that if a carriage be let for hire, and it break down on the journey, the letter of it is liable, and not the party who hired it. But in general the owner owes no duty in the absence of express contract to service

and maintain the chattel during the period of the hiring: *Hadley v Droitwich Construction Co Ltd (Joseph Pugsley & Sons Ltd, third party)* [1967] 3 All ER 911, [1968] 1 WLR 37, CA. The cost of feeding a hired horse falls on the hirer unless it is otherwise agreed (*Story on Bailments* (9th Edn, 1878) s 393), and so does the cost of filling a hired car with petrol.

2 *Story on Bailments* (9th Edn, 1878) s 385.

3 Pothier's *Contrat de Louage* s 77; 1 Domat book 1, tit 4, s 3, art 7.

4 *British Waggon Co v Lea & Co* (1880) 5 QBD 149, DC (distinguishing *Robson v Drummond* (1831) 2 B & Ad 303); approved in *Southway Group Ltd v Wolff and Wolff* (1991) 28 ConLR 109, 57 BLR 33, CA. The position might be otherwise where the hirer contracted in reliance on the lessor's personal qualifications: cf para 58 text and note 12 post. As to the assignment of contracts see further CONTRACT.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(iii) Hirer's Obligations/58. Payment of rent.

(iii) Hirer's Obligations

58. Payment of rent.

The hirer must pay at the agreed time the rent agreed upon for the use of the chattel hired and a failure to do so is a breach of contract which entitles the owner to sue for damages and may, in an appropriate case, entitle the owner to bring the bailment to an end and retake possession of the chattel. A persistent failure to pay rent, which evinces an intention no longer to be bound by the contract, will generally be construed as a repudiation of the bailment entitling the owner to retake possession of the chattel and to claim loss of bargain damages¹. But a failure to pay a single instalment on the due date will not normally amount to a repudiation by the hirer and will not entitle the owner to recover the chattel, unless the contract expressly states that failure to pay a single instalment on the due date will entitle the owner to terminate the contract and recover the chattel². A contractual provision which provides that a failure to pay an instalment on the due date will entitle the owner to retake possession of the chattel will terminate the primary obligations of the parties remaining unperformed but it does not affect the hirer's secondary obligation to pay damages and therefore the measure of damages recoverable is limited to the recovery of the instalments due and unpaid at the date of termination³. Where, however, the contract provides that punctual payment of rent is of the essence of the contract then the damages recoverable are not confined to the arrears of rent as at the date of termination but extend to the loss of future instalments (discounted so as to give their present value), the costs of repossession and interest on these sums less the increased value to the owner of the right to earlier repossession of the chattel than would have been the case if the lease had run its course⁴. Stipulation for payment of a greater sum may fall foul of the penalty clause rule⁵, unless the sum payable is simply the acceleration of an existing liability or a present debt⁶ or the sum is payable on an event which is not a breach of contract⁷, in which cases the penalty clause rule is inapplicable. A clause which is held to be a penalty clause is not struck out of the contract but the clause will not be enforced beyond the actual loss of the party seeking to rely upon it⁸, and the clause cannot be relied upon as evidence of an intention that the owner be entitled to loss of bargain damages in the event of a breach⁹. If the owner sells the chattel before the end of the period of hire, this operates as a rescission of the contract and so the owner cannot recover the rent in accordance with the contract but is relegated to an ordinary claim for damages¹⁰.

If the owner of a chattel hired for a fixed term assigns his interest in the chattel to a third party, the hirer, upon notice in writing of the assignment, becomes liable to pay future instalments of rent to the third party¹¹, unless it can be inferred that the hirer contracted by reference to the

owner's personal qualifications, in which case the contract cannot be enforced against the hirer after the owner has assigned his interest in the chattel¹².

- 1 *Interoffice Telephones Ltd v Robert Freeman Co Ltd* [1958] 1 QB 190, [1957] 3 All ER 479, CA; *Yeoman Credit Ltd v Waragowski* [1961] 3 All ER 145, [1961] 1 WLR 1124, CA; *Overstone Ltd v Shipway* [1962] 1 All ER 52, [1962] 1 WLR 117, CA; *Yeoman Credit Ltd v McLean* [1962] 1 WLR 131n, 105 Sol Jo 990.
- 2 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA.
- 3 *Financings Ltd v Baldock* [1963] 2 QB 104, [1963] 1 All ER 443, CA; *Brady v St Margaret's Trust Ltd* [1963] 2 QB 494, [1963] 2 All ER 275, CA; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683, [1963] 2 All ER 432, CA; *Anglo-Auto Finance Co Ltd v James* [1963] 3 All ER 566, [1963] 1 WLR 1042, CA; *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54, [1967] 2 All ER 345, CA; *Eshun v Moorgate Mercantile Co Ltd* [1971] 2 All ER 402, [1971] 1 WLR 722, CA.
- 4 *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA; cf *UCB Leasing Ltd v Holtom* [1987] RTR 362, CA.
- 5 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 57 ALJR 172, Aust HC.
- 6 *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592, CA; *Wallingford v Mutual Society and Official Liquidator* (1880) 5 App Cas 685, HL; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 57 ALJR 172, Aust HC; *Oresundsvarvet Aktiebolag v Lemos, The Angelic Star* [1988] 1 Lloyd's Rep 122, CA.
- 7 *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA; *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 WLR 399, HL; *Associated Distributors Ltd v Hall* [1938] 2 KB 83, [1938] 1 All ER 511, CA; *Re Apex Supply Co Ltd* [1942] Ch 108, [1941] 3 All ER 473; *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL.
- 8 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.
- 9 *AMEV-UDC Finance Ltd v Austin* (1986) 60 ALJR 741, Aust HC.
- 10 *Wright v Melville* (1828) 3 C & P 542.
- 11 *British Waggon Co and Parkgate Waggon Co v Lea & Co* (1880) 5 QBD 149, DC.
- 12 *Robson v Drummond* (1831) 2 B & Ad 303 (explained in *British Waggon Co and Parkgate Waggon Co v Lea & Co* (1880) 5 QBD 149, DC); cf *Jackson v Swarbrick* [1870] WN 133. As to the assignment of contracts generally see further CONTRACT. As to whether such an assignment constitutes a bill of sale see *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193, CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1672.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(iii) Hirer's Obligations/59. Care of chattel.

59. Care of chattel.

The hirer is, as a general rule, under an obligation to take reasonable care only of the chattel hired, and is not liable for loss or injury happening to it, unless caused by his negligence, or that of his servants¹. His liability may be extended or diminished by the terms of a special contract, which will be construed with reference to the age and condition of the particular chattel at the time of the hiring² and the circumstances of the injury³.

Apart from special contract, the hirer is not responsible for fair wear and tear⁴; nor is he under any obligation to do any repairs or incur expenses⁵ except such as are naturally incidental to the due performance of his obligation to take reasonable care⁶. If he should exceed his duty and execute repairs for which he is not responsible, it is doubtful whether he has any right to claim to be reimbursed by the owner, even though the repairs are necessary and the

expenditure reasonable, and therefore it is advisable for him not to execute them without first consulting the owner⁷.

A term of the contract between the parties that the hirer shall keep the chattel from injury amounts, by implication, to an authority from the owner to the hirer to do all acts necessary for preserving the thing hired, and, as against the owner, a third party can acquire a lien on the chattel for the cost of repairing it at the hirer's request⁸.

The hirer must not use the chattel hired for any purpose other than that for which it was hired; thus a horse hired as a hack and not for hunting or driving must be used as a hack only, and the hirer will be responsible in case of damage arising from its use for any other purpose⁹.

1 *British Crane Hire Corpn Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA (negligent to order mobile crane to manoeuvre over marshy ground without protection of navimats); *Sanderson v Collins* [1904] 1 KB 628, CA; *Bray v Mayne* (1818) Gow 1; *Handford v Palmer* (1820) 2 Brod & Bing 359; *Dean v Keate* (1811) 3 Camp 4, where the hirer of a horse prescribed for it himself when it fell sick instead of calling in a veterinary surgeon; *Ludgate v Lovett* [1969] 2 All ER 1275, [1969] 1 WLR 1016, CA; cf *Blackpool Ladder Centre Ltd v BWB Partnership* [2000] All ER (D) 1802 (Nov), CA. The fact that the chattel is injured whilst in the hirer's possession raises a prima facie presumption against him: see *Dollar v Greenfield* (1905) Times, 19 May, HL, per Lord Halsbury LC; *Fawcett v Smethurst* (1914) 84 LJB 473; and the cases cited in para 43 note 3 ante, the principle of which would seem to apply here. For an earlier decision to the contrary see *Cooper v Barton* (1810) 3 Camp 5n.

2 *Vendair (London) Ltd v Giro Aviation Co Ltd* [1961] 1 Lloyd's Rep 283 (hirers undertaking to return aircraft in 'condition equivalent to when supplied'; hirers liable for fair wear and tear and not merely for deterioration caused by breach of duty of reasonable care); *Schroder v Ward* (1863) 13 CBNS 410; *Brice & Sons v Christiansi and Nielsen* (1928) 44 TLR 335; *Moons Motors Ltd v Kiuan Wou* [1952] 2 Lloyd's Rep 80, CA (contract for hire of car making hirer responsible for repairing damage by accident and stating that a policy of insurance was in force in relation to the use of the car, although no policy was in fact in force covering damage by accident; it was held that the owner was not entitled to recover from the hirer in respect of damage caused by collision).

3 *British Crane Hire Corpn Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA (trade usage; printed conditions incorporated into oral contract). See further *Ritchie's Car Hire Ltd v Bailey* (1958) 108 L Jo 348 (car hirer not liable for accident unless due to his act or default; to avoid a cat he hit a tree; it was held to be an inevitable accident).

4 See *Pomfret v Ricroft* (1669) 1 Wms Saund 321; *Blakemore v Bristol and Exeter Rly Co* (1858) 8 E & B 1035. These are cases of gratuitous loan, but the principle seems to apply here. See further *Moorhouse v Angus & Robertson (No 2) Pty Ltd* [1981] 1 NSWLR 700 at 708 per Samuels JA (obiter), NSW CA.

5 *Sutton v Temple* (1843) 12 M & W 52 at 60 per Lord Abinger CB; *Hyman v Nye* (1881) 6 QBD 685. For a case of special contract excluding such repairs see *Reading v Menham* (1832) 1 Mood & R 234.

6 Eg feeding a hired horse: see Story on Bailments (9th Edn, 1878) s 393. The same would presumably apply to putting oil into a hired car.

7 Story on Bailments (9th Edn, 1878) s 392. As to the lien exercisable by a repairer against a bailor see para 48 text to note 26 ante.

8 *Keene v Thomas* [1905] 1 KB 136. See para 78 post.

9 *Burnard v Haggis* (1863) 14 CBNS 45.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(iii) Hirer's Obligations/60. Return of chattel.

60. Return of chattel.

The hirer must return the hired chattel at the expiration of the agreed term¹. This obligation applies notwithstanding the fact that the task of returning the chattel has become more difficult or costly as a result of some unexpected event occurring independently of the hirer's negligence². But if the performance of his contract to return the chattel becomes impossible because it has perished, this impossibility excuses the hirer provided it did not arise from the fault of the hirer or from some risk which he had taken upon himself³. The hirer's common law duty to return the chattel can, of course, be diminished or enlarged by special contract⁴.

1 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA (which turned on the wording of a special contract); *Mills v Graham* (1804) 1 Bos & PNR 140 at 145 per Mansfield CJ. See also *Ballett v Mingay* [1943] KB 281, [1943] 1 All ER 143, CA, where a minor bailee parted with possession of the goods to a third party who lost them, and the minor was held liable in detinue in the absence of any proof by him that, in parting with the goods, he had not stepped outside the bailment altogether. The last two cases, and *Burnard v Haggis* (1863) 14 CBNS 45 (see para 59 text and note 9 ante), were cases of minor hirers, who cannot be sued upon the contract of bailment unless the thing hired is a necessary, but may be sued upon independent torts committed in relation to the bailed chattel. As to the liability of minors and children generally see CHILDREN AND YOUNG PERSONS.

2 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303 at 311-312, [1974] 1 All ER 1059 at 1063, CA, per Lord Denning MR, and at 313 and 1064 per Sir Eric Sachs.

3 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA; *Taylor v Caldwell* (1863) 3 B & S 826 at 838 per Blackburn J. It would seem that the bailee cannot escape his obligation to return the goods merely by proving that they were destroyed and asserting that the obligation has thus been frustrated; rather he must go further and establish positively that the destruction occurred independently of his default and fell outside his control. In *Jackson (Edinburgh) Ltd v Constructors John Brown Ltd* 1965 SLT 37, the hired chattel was damaged by fire, and in order to exculpate themselves the hirers had only to prove that the fire was accidental, ie that it was not caused by their deliberate act or negligence. See further *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 at 590, [1978] 3 All ER 337 at 340, PC ('... The onus is always upon the bailee ... to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he entrusted the goods for safekeeping'); *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA, The Torenia* [1983] 2 Lloyd's Rep 210 at 216 per Hobhouse J ('... it does not suffice for the bailee to prove that the goods have been lost or destroyed while in his possession; he must go further and prove that he is protected from liability by some common law or contractual defence'). Neither of the last two authorities mentioned involved a bailment by way of hire; rather, they involved bailments for custody and carriage respectively. But it would seem that a similar principle is applicable to contracts of hire. Cf *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd, The Kingswood* [1942] AC 154, [1941] 2 All ER 165, HL; *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1, CA. As to the effect of impossibility of performance on contracts see CONTRACT vol 9(1) (Reissue) para 888 et seq.

4 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(iii) Hirer's Obligations/61. Liability for servant's misconduct.

61. Liability for servant's misconduct.

The negligence of the hirer's servant is, if committed within the scope of the servant's employment, the negligence of the master¹. The master is therefore liable for any want of care towards the hired chattel shown by the servant in the course of his employment². Such liability may arise even though the servant acts in a manner which the master has forbidden, or would not have authorised had he known of the act³.

The master is also liable where the servant commits a deliberate wrong to the chattel, such as damage or theft, if the master has entrusted the chattel to the servant and has delegated any part of his duty of care to him⁴. In that case, the servant commits the wrong in the course of his employment⁵. But where the master has not entrusted the chattel to the servant and has not

delegated any part of his duty of care to the servant, the wrong is not committed in the course of the servant's employment and the master is not liable⁶.

1 *Smith v Stages* [1989] AC 928, [1989] 1 All ER 833, HL (not a case of bailment); and see generally AGENCY vol 1 (2008) PARA 121 et seq; TORT vol 45(2) (Reissue) para 814 et seq.

2 *British Crane Hire Corpn Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA (instruction to take mobile crane over marshy ground without navimats). See also *Dollar v Greenfield* (1905) Times, 19 May (horse bolting from stable). Cf *Arbon v Fussell* (1862) 3 F & F 152 (negligent entrustment of management of chattel to incompetent servant).

3 *Smith v Stages* [1989] AC 928, [1989] 1 All ER 833, HL; *Limpus v London General Omnibus Co* (1862) 1 H & C 526; and see TORT vol 45(2) (Reissue) para 817.

4 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA (sub-bailment for work and labour); *Sanderson v Collins* [1904] 1 KB 628, CA, distinguishing *Coupé Co v Maddick* [1891] 2 QB 413. See para 42 ante. See also Palmer *Bailment* (2nd Edn, 1991) pp 840-872, 1269. The onus of negating such conduct is, in common with the general onus of negating negligence by the servant, on the hirer: *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC (custody); *Transmotors Ltd v Robertson, Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224 (carriage); Palmer *Bailment* (2nd Edn, 1991) pp 833-834.

5 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 738-739, [1965] 2 All ER 725 at 739, CA, per Salmon LJ. See also generally *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215.

6 Cf *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd, The Chyebassa* [1967] 2 QB 250, [1966] 3 All ER 593, CA.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(2) HIRE OF CHATTELS/(iii) Hirer's Obligations/62. Measure of damage.

62. Measure of damage.

A bailor is entitled to recover damages from the bailee if the chattel is damaged or destroyed by the negligence or breach of contract of the bailee¹. In the event of damage to a chattel, the bailor is entitled to recover the cost of repair plus a sum representing the permanent diminution in value of the chattel². The bailor may also claim damages for loss of use of the property during any necessary period of repair or recovery³. In certain circumstances it may be possible to claim loss of profits where there has been damage to a profit-earning chattel⁴.

If a chattel is destroyed, then the bailor can recover the value of the goods at the time of their destruction, together with any consequential damages which are not too remote in law⁵.

1 ¹le subject to any exclusion clauses in the contract of bailment. See generally DAMAGES vol 12(1) (Reissue) para 1088 et seq.

2 See *Hughes v Quentin* (1838) 8 C & P 703, where the bailee's injury of an animal led to liability for the farrier's bill for keep and treatment, and the difference between the animal's original and subsequent value.

3 This is often quantified in terms of the cost of hiring an alternative: see *Davis v Oswell* (1837) 7 C & P 804, where the plaintiff was obliged to hire other horses; *Mediana (Owners) v Comet (Owners, Master and Crew), The Mediana* [1900] AC 113 at 117, HL; *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 2 All ER 184, [1983] 1 WLR 959. Cf *Saleslease Ltd v Davis* [2000] 1 All ER (Comm) 883, [1999] 1 WLR 1664, CA (lessor's damages against third party who took possession from hirer, his tenant).

4 This has been said to depend on the knowledge of the bailee of the profit-making capacity of the chattel: see *Bodley v Reynolds* (1846) 8 QB 779; and cf *France v Gaudet* (1871) LR 6 QB 199, Ex Ch; *The Arpad* [1934] P

189, CA; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA. See para 86 post; and DAMAGES vol 12(1) (Reissue) paras 863-864, 1096.

5 See DAMAGES vol 12(1) (Reissue) para 862 et seq; TORT vol 45(2) (Reissue) para 542 seq.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(i) Nature of the Contract/63. Nature of contract.

(3) HIRE OF WORK AND LABOUR

(i) Nature of the Contract

63. Nature of contract.

Hire of work and labour¹ is a class of bailment based on a contract in which one of the two contracting parties undertakes to do something to a chattel, for example, to carry it or repair it, in consideration of a reward to be given to him². It is essential to constitute a valid contract of this description that there should be some work to be performed in connection with a specified chattel, and that a reward should be agreed to be given in return for the labour³.

The distinction between this contract and that of sale lies in the fact that the work and labour results in nothing which can properly be deemed the subject of a sale, inasmuch as the chattel upon which the work is performed, or the materials out of which the chattel delivered to the hirer is made, are already the property of the hirer, and do not, as in the case of sale, become his property by virtue of the contract⁴. The contract is none the less one of work and labour where, though the principal materials belong to the hirer, the workman furnishes accessories or ornaments, as in the case of a tailor who is employed to make up the hirer's cloth, and who supplies his own buttons and thread⁵. If proceedings are brought to recover payment for work done and materials supplied for the purposes of the work, the value of the materials should be expressly claimed⁶.

Certain terms are implied by statute⁷ into contracts for the supply of a service⁸. In the Supply of Goods and Services Act 1982, a 'contract for the supply of a service' means a contract under which a person ('the supplier') agrees to carry out a service⁹. A contract is a contract for the supply of a service whether or not goods are also transferred or to be transferred, or bailed or to be bailed by way of hire, under the contract, and whatever is the nature of the consideration for which the service is to be carried out¹⁰.

1 *le locatio operis faciendi*: see para 2 note 9 ante.

2 Jones on Bailments (4th Edn, 1833) pp 90-91; Palmer *Bailment* (2nd Edn, 1991) ch 14. As to carriers see CARRIAGE AND CARRIERS.

3 It does not appear that the consideration need be monetary in order to constitute a contract for the hire of work and labour: cf Pothier's *Contrat de Louage* ss 397-402; *Keys v Harwood* (1846) 2 CB 905.

4 Cf *Lee v Griffin* (1861) 1 B & S 272 at 277 per Blackburn J; and see para 1 ante. A contract, however, is not necessarily one of sale even where the workman supplies the materials, if the substance of the contract is that skill and labour have to be exercised and the materials are merely auxiliary: see *Grafton v Armitage* (1845) 2 CB 336 (explaining *Atkinson v Bell* (1828) 8 B & C 277); *Clay v Yates* (1856) 1 H & N 73; *Robinson v Graves* [1935] 1 KB 579, CA. Contrast *J Marcel (Furriers) Ltd v Tapper* [1953] 1 All ER 15, [1953] 1 WLR 49; and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 3.

5 Story on Bailments (9th Edn, 1878) s 423. Cf the cases cited in note 4 supra. Where materials are used in engineering or building operations to construct or erect engines or buildings, the contract will normally be one

for work and labour: *Clark v Bulmer* (1843) 11 M & W 243; *Tripp v Armitage* (1839) 4 M & W 687; *Chanter v Dickinson* (1843) 5 Mann & G 253.

6 *Heath v Freeland* (1836) 1 M & W 543; cf *Cotterell v Apsey* (1815) 6 Taunt 322 (contract to build house, supplying labour and materials; value of materials not recoverable as goods sold, though original contract superseded as result of deviation).

7 The Supply of Goods and Services Act 1982 Pt II (ss 12-16).

8 See *ibid* s 13 (see para 69 post), s 14 (see para 68 post), s 15 (see para 64 post). The Secretary of State may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, provide that one or more of ss 13-15 is or are not to apply to services of a description specified in the order; and such an order may make different provision for different circumstances: s 12(4), (5). As to the orders that have been made see the Supply of Services (Exclusion of Implied Terms) Order 1982, SI 1982/1771; the Supply of Services (Exclusion of Implied Terms) Order 1983, SI 1983/902; the Supply of Services (Exclusion of Implied Terms) Order 1985, SI 1985/1; and para 69 post.

9 Supply of Goods and Services Act 1982 s 12(1). A contract of service or apprenticeship is not a contract for the supply of a service: s 12(2).

10 *Ibid* s 12(3). Where a right, duty or liability would arise under a contract for the supply of a service by virtue of Pt II, it may, subject to s 16(2) and the Unfair Contract Terms Act 1977 (particularly s 3: see CONTRACT vol 9(1) (Reissue) para 823), be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract: Supply of Goods and Services Act 1982 s 16(1). An express term does not negative a term implied by Pt II unless inconsistent with it: s 16(2). Nothing in Pt II prejudices: (1) any rule of law which imposes on the supplier a duty stricter than that imposed by s 13 (see para 69 post); or (2) subject to head (1) *supra*, any rule of law whereby a term not inconsistent with Pt II is to be implied into a contract for the supply of a service: s 16(3). Part II has effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description: s 16(4).

UPDATE

63-64 Nature of contract, Obligation to remunerate and pay for materials

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/ (ii) Owner's Obligations/64. Obligation to remunerate and pay for materials.

(ii) Owner's Obligations

64. Obligation to remunerate and pay for materials.

The hirer of labour must, at the time or times and in the manner appointed, pay the workman the agreed price. Where, under a contract for the supply of a service, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge¹. What is a reasonable charge is a question of fact².

The acceptance of services does not, however, in all cases necessarily imply that such services are to be remunerated. In general, remuneration cannot be successfully claimed for services voluntarily performed without request³. In general, whether or not work and labour is to be remunerated depends upon the contract under which the work was done⁴, but employment of a

man whose trade it is to do the work in question prima facie implies a contract by the employer to pay him a fair and reasonable price for his work⁵. A person called in to do work of a class which he holds himself out as qualified to do, which will be useful only if effective, and which he is left to do in his own way, can recover nothing if it proves ineffective and the employer gets no benefit from it⁶. A workman's right to make a claim for the agreed remuneration for work completed does not arise until the work is done and the employer has had a reasonable opportunity of ascertaining whether it has been properly done⁷.

Where one person is engaged by another to do work, the workman can prima facie look for his remuneration only to the actual party commissioning the work⁸, unless it is known to both parties that the work is for the benefit of a third party for whom the commissioning party is acting merely as agent⁹.

The hirer must also (subject to the particular terms of the contract) pay for all materials employed by the workman in the manufacture, alteration or repair of the chattel which is the subject of the contract, provided they are necessary for the completion of the work, and were either specifically or impliedly ordered¹⁰.

1 Supply of Goods and Services Act 1982 s 15(1). For the meaning of 'contract for the supply of a service' see para 63 ante. The statutory definition corresponds with the obligation implied at common law: see *Jewry v Busk* (1814) 5 Taunt 302; *Brown v Nairne* (1839) 9 C & P 204; cf *Cannon v Miles* [1974] 2 Lloyd's Rep 129, CA. If it can be established that a particular rate of remuneration is customary for a particular employment, that rate is accepted as just and reasonable: *Brown v Nairne* supra at 205; and see eg *Price v Hong Kong Tea Co* (1861) 2 F & F 466; *A-G v Drapers' Co* (1869) LR 9 Eq 69; *Debenham v King's College, Cambridge* (1884) Cab & El 438; *Faraday v Tamworth Union* (1916) 86 LJ Ch 436. See also AGENCY vol 1 (2008) PARA 101; AUCTION; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS. If there is no trade usage, the court may take into account any bargaining between the parties: *Scarisbrick v Parkinson* (1869) 20 LT 175; *Way v Latilla* [1937] 3 All ER 759, HL. See also *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA. As to evidence of usage see CUSTOM AND USAGE.

2 Supply of Goods and Services Act 1982 s 15(2).

3 Cf *Taylor v Laird* (1856) 25 LJ Ex 329 at 332 per Pollock CB: 'Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?'. See RESTITUTION vol 40(1) (2007 Reissue) para 128.

4 For examples of the principle see *Reeve v Reeve* (1858) 1 F & F 280; *Taylor v Brewer* (1813) 1 M & S 290; *Moffatt v Laurie* (1855) 15 CB 583; *Ex p Metcalfe* (1856) 6 E & B 287; *Hingeston v Kelly* (1849) 18 LJ Ex 360; and AGENCY vol 1 (2008) PARA 101; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS AND SURVEYORS; EMPLOYMENT.

5 See AGENCY vol 1 (2008) PARA 101; EMPLOYMENT vol 39 (2009) PARA 22 et seq.

6 *Farnsworth v Garrard* (1807) 1 Camp 38 at 39 per Lord Ellenborough: 'If there has been no beneficial service there shall be no pay, but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand; ... the claim shall be co-extensive with the benefit'. Cf *Duncan v Blundell* (1820) 3 Stark 6 at 7 per Bayley J; *Pearce v Tucker* (1862) 3 F & F 136. See also para 69 post.

7 *Hughes v Lenny* (1839) 5 M & W 183.

8 *Meriel v Wymondsold* (1661) Hard 205. See also the cases cited in para 71 note 5 post.

9 *Chidley v Norris* (1862) 3 F & F 228. But the immediate employer is liable if he leads the person employed to believe that he, and not the third party, will pay for the work: *Chidley v Norris* supra. See also AGENCY vol 1 (2008) PARA 157.

10 Story on Bailments (9th Edn, 1878) s 425; *Wilmot v Smith* (1828) 3 C & P 453.

UPDATE

63-64 Nature of contract, Obligation to remunerate and pay for materials

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/ (ii) Owner's Obligations/65. Payment where work not completed.

65. Payment where work not completed.

The issue of whether payment may be demanded prior to completion of the work will depend as a matter of construction upon whether the contract consists of an entire obligation (sometimes called a 'lump sum contract') or divisible obligations¹.

Where a man is employed to do work under a divisible contract, there is an express or implied agreement that payments will be made in proportion to the work performed², unless a trade custom to the contrary can be proved³. Where the work is not completed, whether through the fault of the workman⁴ or otherwise⁵, in the absence of an express or implied agreement to complete it, the hirer may nevertheless have to pay for the work actually done and for the materials provided⁶.

A man who undertakes to do specified work in connection with a chattel for an agreed sum to be paid on completion (a lump sum contract), but who fails substantially to complete the work, is not entitled to recover the price agreed upon, nor even the actual value of the work he has done on a quantum meruit basis⁷, unless the failure to complete it is due to the hirer's default or the parties can be held to have entered into a new contract, or the failure to perform is due to impossibility or frustration⁸.

However, where a man engages to do work for a lump sum payable on completion and the work is substantially performed, the hirer cannot, as a rule, repudiate liability on the ground that the work is in some respects not in accordance with the specification if the breach does not go to the root of the contract; in such a case he is liable to pay the agreed price, less a deduction based on the cost of making good the defects or omissions proved⁹. Even if in such a case the parties have made entire performance a condition precedent to payment, a hirer who takes the benefit of the work done waives the condition and must pay the agreed price subject to appropriate deductions¹⁰.

If the employer refuses to perform or renders himself incapable of performing his part of the contract or by his own acts prevents the full performance of the contract by the workman, the workman may rescind the contract and sue upon a quantum meruit¹¹; or he may sue for damages for breach of contract¹². Where a person sues upon a quantum meruit he must be prepared to show what the work was worth¹³.

If a new contract is made to pay for the work actually done, the workman is entitled to recover the price agreed upon less a deduction, the measure of the deduction being generally the sum which it would take to alter or complete the work so as to make it correspond with the specification¹⁴.

Where a contract has become impossible of performance or has been frustrated, the parties' rights and liabilities under it are governed by statute¹⁵.

Where the hirer is under no obligation to pay for the work done, he incurs no additional obligation by reason of the fact that the workman has incorporated his own materials with those of the hirer¹⁶.

- 1 See CONTRACT vol 9(1) (Reissue) para 942. Notice, however, that in most sizeable modern contracts the contractual terms will provide for payment by instalments, thus generally rendering this distinction irrelevant.
- 2 *Roberts v Havelock* (1832) 3 B & Ad 404; *The Tergeste* [1903] P 26; cf *J Rosenthal & Sons Ltd v Esmail* [1965] 2 All ER 860, [1965] 1 WLR 1117, HL.
- 3 *Gillett v Mawman* (1808) 1 Taunt 137. See CUSTOM AND USAGE.
- 4 *Roberts v Havelock* (1832) 3 B & Ad 404.
- 5 *Menetone v Athawes* (1764) 3 Burr 1592.
- 6 *Appleby v Myers* (1867) LR 2 CP 651 at 660 per Blackburn J.
- 7 *Sinclair v Bowles* (1829) 9 B & C 92. Cf *Sumpter v Hedges* [1898] 1 QB 673, CA (building contract), followed in *Wheeler v Stratton* (1911) 105 LT 786, DC, and *Small & Sons Ltd v Middlesex Real Estates Ltd* [1921] WN 245. See also *Munro v Butt* (1858) 8 E & B 738; *Ellis v Hamlen* (1810) 3 Taunt 52; *Gillett v Mawman* (1808) 1 Taunt 137; *Adlard v Booth* (1835) 7 C & P 108 (explained in *Appleby v Myers* (1867) LR 2 CP 651 at 652 per Blackburn J); *Cutter v Powell* (1795) 6 Term Rep 320; *Bates v Hudson* (1825) 6 Dow & Ry KB 3; *Hulle v Heightman* (1802) 2 East 145; *Vigers v Cook* [1919] 2 KB 475, CA; *Crosthwaite v Gardner* (1852) 18 QB 640; *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA. See generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS; CONTRACT; EMPLOYMENT.
- 8 *Hoening v Isaacs* [1952] 2 All ER 176 at 181-182, CA, per Denning LJ; *Appleby v Myers* (1867) LR 2 CP 651 at 661 per Blackburn J.
- 9 *Hoening v Isaacs* [1952] 2 All ER 176, CA, applying *Mondel v Steel* (1841) 8 M & W 858 and *H Dakin & Co Ltd v Lee* [1916] 1 KB 566, CA. See also *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA. As to the effect of negligence or lack of skill on the workman's part see further para 69 post.
- 10 *Hoening v Isaacs* [1952] 2 All ER 176 at 181, CA, per Denning LJ.
- 11 See eg *Planché v Colburn* (1831) 8 Bing 14; *Kewley v Stokes* (1846) 2 Car & Kir 435; *Prickett v Badger* (1856) 1 CBNS 296; *Burn v Miller* (1813) 4 Taunt 745; *Craven-Ellis v Canons Ltd* [1936] 2 KB 403 at 410-411, [1936] 2 All ER 1066 at 1072-1073, CA, per Greer LJ. See further AGENCY vol 1 (2008) PARA 108; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS; CONTRACT.
- 12 See AGENCY vol 1 (2008) PARA 108; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS; CONTRACT.
- 13 *Basten v Butler* (1806) 7 East 479.
- 14 *Thornton v Place* (1832) 1 Mood & R 218 at 219 per Parke J; *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72.
- 15 See the Law Reform (Frustrated Contracts) Act 1943; and CONTRACT vol 9(1) (Reissue) paras 903, 912 et seq.
- 16 *Sinclair v Bowles* (1829) 9 B & C 92.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/ (ii) Owner's Obligations/66. Extras.

66. Extras.

If a workman without any order or request does more work than was originally stipulated for in the contract, and the hirer did not acquiesce in the change, although the extra work is essential to the proper performance of the contract, the hirer, in the absence of bad faith or concealment¹, is not bound to pay more than the sum originally agreed upon by him². So if a workman, employed to do specified work on a chattel for an agreed sum, instead of doing the specified work does different, even if better, work, he can recover from the hirer neither the

agreed sum under the special contract, nor the value of the work done on a quantum meruit basis, unless the hirer has sanctioned or acquiesced in the change. The mere fact that the hirer has received the chattel on which the work has been done and has sold it at an enhanced price does not amount to acquiescence³.

But extra work which, during the course of the work, has been ordered or assented to by the hirer, must be paid for on a quantum meruit basis. In such a case, the contract is binding so far as it can be traced, and the quantum meruit applies to the remainder⁴.

1 Story on Bailments (9th Edn, 1878) s 425.

2 *Brown v Lord Rollo* (1832) 10 Sh 667, Ct of Sess; *Wilmot v Smith* (1828) 3 C & P 453. See generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS; CONTRACT.

3 *Forman & Co Pty Ltd v The Liddesdale* [1900] AC 190, PC. Cf *Munro v Butt* (1858) 8 E & B 738; and para 64 note 3 ante.

4 *Napier v Lang* (1834) 12 Sh 523, Ct of Sess; *Shipton v Casson* (1826) 5 B & C 378.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/ (ii) Owner's Obligations/67. Hirer must not obstruct workman.

67. Hirer must not obstruct workman.

The hirer must afford the workman every reasonable facility for entering upon and completing the contract which he has undertaken to perform¹. If, after the contract has been entered upon, the hirer wilfully obstructs the workman and thereby retards him in his employment, or intervenes without just cause so as to prevent its completion, he is liable to the workman for the loss actually caused by his interference². A similar duty and liability in case of default is imposed upon the hirer, if it is one of the terms of the bargain that he will supply the workman with the necessary materials for the employment undertaken³.

1 *Wells v Army and Navy Co-operative Society Ltd* (1902) 86 LT 764; *Prickett v Badger* (1856) 1 CBNS 296; *Green v Lucas* (1875) 33 LT 584, CA; *Russell v Viscount Sa da Bandeira* (1862) 13 CBNS 149; *Courtney v Waterford and Central Ireland Rly Co* (1878) 4 LR 11.

2 *Mackay v Dick* (1881) 6 App Cas 251, HL. See also *Lilley v Barnsley* (1844) 2 Mood & R 548. The workman can claim damages for breach of contract, or under a quantum meruit claim to recover a reasonable remuneration for his partial performance: *Planché v Colburn* (1831) 8 Bing 14. Cf *White & Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL; *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326; and see CONTRACT.

3 Pothier's Contrat de Louage s 410.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/68. Obligation to do the work.

(iii) Workman's Obligations

68. Obligation to do the work.

The first obligation of the workman is to perform his undertaking¹. If the workman agrees to perform work which will put the hirer's goods in a certain condition, and the hirer relies on the workman's skill and judgment, the workman owes an absolute obligation to put the goods into that condition and his failure to do so constitutes a total failure of consideration². The workman will be relieved of the duty to perform, however, if the performance is rendered impossible by the hirer's act³ or by circumstances beyond the workman's control, as where the chattel upon which the work is to be performed is accidentally destroyed by fire⁴. However, the fact that the work was, by its nature, impossible to perform will not relieve the workman from liability for failure to perform where the hirer has relied on his skill and judgment⁵. The workman is responsible if the impossibility should have been foreseen by him, and if the hirer has acted in good faith in relying on his ability to perform the work⁶. Where no time for performance is fixed, the undertaking must be performed within a reasonable time⁷. Where, under a contract for the supply of a service⁸ by a supplier acting in the course of a business⁹, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time¹⁰. What is a reasonable time is a question of fact¹¹. If by his own act the workman incapacitates himself from performing his contract, he forthwith becomes liable for the breach¹².

1 *Alderslade v Hendon Laundry Ltd* [1945] KB 189 at 193, [1945] 1 All ER 244 at 246, CA, per Lord Greene MR. See also Story on Bailments (9th Edn, 1878) s 428.

2 *GK Serigraphics v Dispro Ltd* [1980] CA Transcript 916.

3 See eg *Holme v Guppy* (1838) 3 M & W 387; and see generally CONTRACT.

4 *Menetone v Athawes* (1764) 3 Burr 1592. See also *Appleby v Myers* (1867) LR 2 CP 651. As to the discharge of contracts on the ground of impossibility of performance or frustration, and for statutory provisions as to the effect of frustration, see CONTRACT vol 9(1) (Reissue) para 888 et seq.

5 *Duncan v Blundell* (1820) 3 Stark 6 at 7 per Bayley J; *Pearce v Tucker* (1862) 3 F & F 136.

6 *Combe v Simmonds* (1853) 1 WR 289; *Pearce v Tucker* (1862) 3 F & F 136.

7 See eg *Wigginton v Dodd* (1862) 2 F & F 844; and see CONTRACT vol 9(1) (Reissue) para 929.

8 For the meaning of 'contract for the supply of a service' see para 63 ante.

9 As to the meaning of 'business' see para 55 note 4 ante.

10 Supply of Goods and Services Act 1982 s 14(1).

11 *Ibid* s 14(2). As to the exclusion of implied terms see s 16; the Unfair Contract Terms Act 1977; para 63 ante; and CONTRACT vol 9(1) (Reissue) para 820 et seq.

12 See eg *Planché v Colburn* (1831) 8 Bing 14; and see generally CONTRACT.

UPDATE

68-69 Obligation to do the work, Obligation to exercise skill

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/69. Obligation to exercise skill.

69. Obligation to exercise skill.

In a contract for the supply of a service¹ where the supplier is acting in the course of a business², there is an implied term that the supplier will carry out the service with reasonable care and skill³. This provision is in conformity with the general rule of common law that all workmen undertake to use the skills appropriate to their particular crafts⁴. The acceptance by a person of work of a class which he holds himself out as qualified to do amounts to a warranty on his part that he possesses the requisite skill and ability to do that work⁵. Where there is neither a general nor a particular representation of skill and ability, a workman incurs no responsibility in respect of his want of either. If, for instance, a man should employ a general labourer to clean or mend his watch, the employer would probably be held to have incurred all risks himself⁶. Moreover, the public profession of an art or craft amounts only to a representation that the artificer or craftsman is reasonably competent to carry out any work of the class he professes to do, and does not make him an insurer; he contracts only to display sufficient skill and knowledge of his calling to perform all ordinary duties connected with it⁷.

When through negligence or lack of skill the workman fails to perform in a workmanlike manner the work he has undertaken, he may forfeit in whole or part his claim to remuneration⁸, and, in addition, he may become liable to the hirer for the loss sustained in consequence of his breach of duty⁹; but acceptance by the hirer of the labour after a slight and unimportant breach of the contract may amount to a waiver of the breach¹⁰.

Where the contract is a contract for work and materials, and the hirer makes known the purpose for which the materials are intended and that he relies on the workman's skill and judgment, there is implied at common law a warranty that the materials are fit for the purpose. The workman is accordingly liable for damage resulting from unfitness of the materials, even though they may have been supplied by a third party¹¹. In a contract for work and materials there is also, at common law, irrespective of the hirer's reliance on the workman's skill and judgment, an implied warranty that the materials are of good or merchantable quality¹². These warranties have now been substantially superseded by statute¹³.

1 For the meaning of 'contract for the supply of a service' see para 63 ante.

2 As to the meaning of 'business' see para 55 note 4 ante.

3 Supply of Goods and Services Act 1982 s 13. As to implied terms in contracts see CONTRACT vol 9(1) (Reissue) para 778 et seq. As to the exclusion of implied terms see s 16; the Unfair Contract Terms Act 1977; para 63 ante; and CONTRACT.

In exercise of his power under the Supply of Goods and Services Act 1982 s 12(4) (see para 63 ante), the Secretary of State has provided by order that s 13 is not to apply to the following services: (1) the services of an advocate in court or before any tribunal, inquiry or arbitrator and in carrying out preliminary work directly affecting the conduct of the hearing (Supply of Services (Exclusion of Implied Terms) Order 1982, SI 1982/1771, reg 2(1)); (2) the services rendered to a company by a director of the company in his capacity as such (reg 2(2)); (3) the services rendered to a building society by a director in his capacity as such (Supply of Services (Exclusion of Implied Terms) Order 1983, SI 1983/902, reg 2(1)(a)); (4) the services rendered to an industrial or provident society by any member of the committee of management or other directing body in his capacity as such (reg 2(1)(b)); (5) the services rendered by an arbitrator, including an umpire, in his capacity as such (Supply of Services (Exclusion of Implied Terms) Order 1985, SI 1985/1, reg 2).

As to the duty of care owed by tour operators under the Supply of Goods and Services Act 1982 s 13 see *Wilson v Best Travel Ltd* [1993] 1 All ER 353, DC.

4 *le spondet peritiam artis*. See *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831 at 843, [1989] 2 All ER 514 at 519-520, HL, per Lord Templeman.

5 *Duncan v Blundell* (1820) 3 Stark 6; *Harmer v Cornelius* (1858) 5 CBNS 236 at 246 per Willes J; 1 Bell's Com lib 3, part 1, c 3, s 2, tit Skill; *Coggs v Bernard* (1703) 2 Ld Raym 909; *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA. Compare para 21 notes 1-3 ante (gratuitous bailment). See also the cases cited in para 68 note 6 ante; and see NEGLIGENCE vol 78 (2010) PARAS 23, 47 et seq.

6 Jones on Bailments (4th Edn, 1833) p 100; *Harmer v Cornelius* (1858) 5 CBNS 236 at 246 per Willes J.

7 *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831 at 843, [1989] 2 All ER 514 at 519-520, HL, per Lord Templeman; *Lanphier v Phipos* (1838) 8 C & P 475 at 479 per Tindal CJ.

8 Cf *Cousins v Paddon* (1835) 2 Cr M & R 547; *Bracey v Carter* (1840) 12 Ad & El 373; *Shaw v Arden* (1832) 9 Bing 287; *Moneypenny v Hartland* (1824) 1 C & P 352; *Pardow v Webb* (1842) Car & M 531; and see further para 65 ante. See also AGENCY vol 1 (2008) PARA 101 et seq; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

9 *Combe v Simmonds* (1853) 1 WR 289; Story on Bailments (9th Edn, 1878) s 431; cf *Seare v Prentice* (1807) 8 East 348; and see NEGLIGENCE.

10 *Lucas v Godwin* (1837) 3 Bing NC 737; *Hoenig v Isaacs* [1952] 2 All ER 176, CA.

11 *GH Myers & Co v Brent Cross Service Co* [1934] 1 KB 46, DC; *Stewart v Reavell's Garage* [1952] 2 QB 545, [1952] 1 All ER 1191 (applying principles laid down in relation to the sale of goods); cf *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] AC 402, HL; *Samuels v Davis* [1943] KB 526, [1943] 2 All ER 3, CA; *Dodd and Dodd v Wilson and McWilliam* [1946] 2 All ER 691 (implied condition of fitness of toxoid used by veterinary surgeons); *Watson v Buckley, Osborne, Garrett & Co Ltd and Wyrovoys Products Ltd* [1940] 1 All ER 174; *Holmes v Ashford* [1950] 2 All ER 76, CA; *Ingham v Emes* [1955] 2 QB 366, [1955] 2 All ER 740, CA; *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL (roof tiling); *Gloucestershire County Council v Richardson* [1969] 1 AC 480, [1968] 2 All ER 1181, HL (concrete columns for construction project). As to implied conditions of fitness on the sale of goods see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 77-82.

12 See the cases cited in note 11 supra.

13 See para 72 et seq post.

UPDATE

68-69 Obligation to do the work, Obligation to exercise skill

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/70. Obligation to exercise care.

70. Obligation to exercise care.

As the workman is entitled to a reward, either by express agreement or by implication, he is obliged not only to perform his work with reasonable care and skill, but also to take ordinary care of the chattel entrusted to him¹, and to restore it to the hirer at the expiration of the period for which it was entrusted to him. If, therefore, he detains it beyond the proper period, he is guilty of a breach of duty, the measure of damages for which is prima facie the sum which would have been earned in the ordinary course of employment of the chattel during the period of its detention²; and the workman is liable as an insurer if it becomes lost or destroyed³. Where, however, it is lost or injured whilst properly in the workman's custody, he will be responsible for the full amount of the damage sustained, unless he can show⁴ that the loss or injury is not attributable to any want of reasonable care on his part⁵.

The workman is liable for any loss of the chattel arising from the unauthorised act of his servant, providing that the servant was acting within the scope of his employment⁶.

1 Jones on Bailments (4th Edn, 1833) p 91; *Leck v Maestaer* (1807) 1 Camp 138; *Clarke v Earnshaw* (1818) Gow 30; *Becker v Lavender Ltd* (1946) 62 TLR 504 (misdelivery); *Sinclair v Juner* 1952 SC 35; *Spriggs v Sotheby Parke Bernet & Co Ltd* [1986] 1 Lloyd's Rep 487, CA.

2 *Re Trent and Humber Co, ex p Cambrian Steam Packet Co* (1868) 4 Ch App 112 at 117 per Lord Cairns LC.

3 *Shaw & Co v Symmons & Sons* [1917] 1 KB 799.

4 See paras 43 note 3 ante, 59 note 1 ante.

5 *Leck v Maestaer* (1807) 1 Camp 138; *Clarke v Earnshaw* (1818) Gow 30. Cf *Gillett v Mawman* (1808) 1 Taunt 137; *Wilson v Powis* (1826) 11 Moore CP 543; *Jobson v Palmer* [1893] 1 Ch 71; *Bullen v Swan Electric Engraving Co* (1907) 23 TLR 258, CA; *Morison, Pollexfen and Blair v Walton* (1909), cited [1915] 1 KB at 90, HL; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; *Cowan v Blackwill Motor Caravan Conversions Ltd* [1978] RTR 421, CA; *Idnani v Elisha* [1979] RTR 488, CA (motor repairers); *Spriggs v Sotheby Parke Bernet & Co Ltd* [1986] 1 Lloyd's Rep 487, CA (auctioneer in possession of diamond); *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* (1990) Times, 7 March (aircraft). Cf *Sinclair v Juner* 1952 SC 35. The liability continues after the work is done until the original relationship is expressly altered (*Mitchell v Davis* (1920) 37 TLR 68); or until the bailor has, by committing a repudiatory breach of his implied obligation to collect the goods within a reasonable time, forfeited the right to sue for breach of the bailee's duty of reasonable care (*Pedrick v Morning Star Motors Ltd* (14 February 1979, unreported), CA; *Ridyard v Roberts* (16 May 1980, unreported), CA; *Jerry Juhan Developments SA v Avon Tyres Ltd* (1999) Times, 25 January).

6 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; and see the cases cited in para 39 note 17 ante.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/71. Delegation.

71. Delegation.

In general, the workman's obligation to perform the work is personal to him. The hirer is presumed to have engaged the workman on the strength of his personal skill and reputation. The workman cannot, therefore, delegate the work to a third party and is prohibited from conferring possession on a third party for that purpose¹. This general rule applies irrespective of whether the contract expressly obliges the workman to perform in person or not and irrespective of whether the hirer has proved that he relied on the workman's personal skill and reputation in entrusting the work to him². A workman who delegates in breach of the general rule does so at his peril³. He becomes strictly liable for the safety of the goods as an insurer⁴. Further, the third party to whom the work is delegated in breach of the general rule cannot bring a claim in contract to recover the cost of his services from the hirer, because there is no privity of contract between the hirer and himself⁵.

The general rule may be displaced by the express terms of the contract, or by a course of dealing between the parties⁶, or by the particular circumstances of the case. In some cases the nature of the work will be such that permission to delegate or sub-contract can be inferred⁷. In others, the workman may be entitled to delegate non-specialist aspects of the work, such as the return carriage of the goods to the hirer when the work is completed⁸. But the workman remains liable for any default which his delegate or sub-contractor commits during the period of his possession of the goods⁹.

If the hirer, after receiving notice that the contract has been transferred to a third party, allows the assignee to proceed with the work, there may be a novation of the contract, and the

assignee is entitled to sue the employer for the value of the work done by him¹⁰. Whether there is a novation depends upon the circumstances of the case.

The right of a workman to receive payment for his work, as distinct from the liability to perform the work, may be assigned in the same manner as any other debt¹¹.

1 *Davies v Collins* [1945] 1 All ER 247, CA; *Martin v N Negin Ltd* (1945) 172 LT 275, CA (dry-cleaning; but in both cases the court relied on the express terms of the contract); *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA (warehousing); *Garnham, Harris & Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940 (carriage; but goods exceptionally valuable and sub-carriers negligently selected); *Hobbs v Petersham Transport Co Pty Ltd, Petersham Transport Co Pty Ltd v ASEA Electric (Australia) Pty Ltd* (1971) 45 ALJR 356 at 362 per Windeyer J, Aust HC (carriage); *Cassils & Co and Sassoon & Co v Holden Wood Bleaching Co Ltd* (1914) 84 LJB 834 at 839-840, CA, per Buckley LJ, at 843-844 per Phillimore LJ, and at 845-846 per Pickford LJ (bleaching); *Morgan v Maurer & Son* (1964) 30 Ir Jur Rep 31 (repair of watch); *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700 (warehousing and port agents); *Southway Group Ltd v Wolff and Wolff* (1991) 28 ConLR 109, 57 BLR 33, CA (developing fitted kitchens). Cf the Supply of Goods and Services Act 1982 s 13; and see para 69 ante; and AGENCY vol 1 (2008) PARA 48 et seq; CONTRACT vol 9(1) (Reissue) para 873; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 97, 470.

2 *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA.

3 See the cases cited in note 1 supra; and para 39 ante.

4 For qualifications on the workman's liability as an insurer see paras 69-70 ante.

5 *Schmalig v Thomlinson* (1815) 6 Taunt 147; and see *Cull v Backhouse* (1793) 6 Taunt 148n, note (a). See generally AGENCY vol 1 (2008) PARA 54 et seq.

6 *Krieger v Bell* [1943] SASR 153 at 172 per Mayo J, S Aust SC (repair of truck).

7 *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534 at 539, [1950] 1 All ER 1072 at 1076, CA, per Somervell LJ, and at 542 and 1081 per Denning LJ; *Robson v Drummond* (1831) 2 B & Ad 303; *British Waggon Co and Parkgate Waggon Co v Lea & Co* (1880) 5 QBD 149.

8 *Punch v Savoy Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA (repair of brooch; method of return carriage failed to take account of value of brooch; bailee liable).

9 *Genn v Winkel* (1912) 28 TLR 483, CA; Palmer *Bailment* (2nd Edn, 1991) p 905. See also *British Road Services Ltd v Arthur V Crutchley & Co Ltd (Factory Guards Ltd, third party)* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA (warehouseman entitled to delegate security of warehouse to carefully selected firm of security guards, but remained answerable for defaults of latter); *G Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG* [2002] EWCA Civ 850, [2002] All ER (D) 13 (May) (yard owner responsible for the goods delivered to the yard to look after irrespective of whoever it employed to discharge its duties). See also *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700.

10 *Aspinall v London and North Western Rly Co* (1853) 11 Hare 325; *Oldfield v Lowe* (1829) 9 B & C 73. As to the assignor's rights against the assignee see *Humphreys v Jones* (1850) 5 Exch 952.

11 *Russell & Co Ltd v Austin Fryers* (1909) 25 TLR 414. As to the assignment of rights under contracts see generally CHOSER IN ACTION vol 13 (2009) PARAS 6, 13 et seq; CONTRACT vol 9(1) (Reissue) para 754 et seq.

UPDATE

71-76 Delegation ... Sample

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/72. Liability for materials supplied by workman.

72. Liability for materials supplied by workman.

Certain terms are implied by statute into contracts for the transfer of goods¹. In the Supply of Goods and Services Act 1982, a 'contract for the transfer of goods' means a contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract². An excepted contract means any of the following: (1) a contract for the sale of goods³; (2) a hire-purchase agreement⁴; (3) a contract under which the property in goods is, or is to be, transferred in exchange for trading stamps on their redemption⁵; (4) a transfer or agreement to transfer which is made by deed and for which there is no consideration other than the presumed consideration imported by the deed⁶; (5) a contract intended to operate by way of mortgage, pledge, charge or other security⁷.

For the purposes of the Act, a contract is a contract for the transfer of goods whether or not services are also provided or to be provided under the contract, and (subject to the provisions relating to excepted contracts⁸) whatever is the nature of the consideration for the transfer or agreement to transfer⁹.

A contract for work and materials¹⁰ is a contract for the transfer of goods unless otherwise excepted. Thus where a bailee for work and labour agrees, in addition to performing work upon the bailor's goods, to supply materials which are to be added to or intermixed with the bailor's goods, this is a contract for the transfer of goods unless it is an excepted contract within one of the categories described above.

Where a right, duty or liability would arise under a contract for the transfer of goods by implication of law, it may be negated or varied by express agreement¹¹, or by the course of dealing between the parties, or by such usage as binds both parties to the contract¹². An express condition or warranty does not negative a condition or warranty implied by statute¹³ into a contract for the transfer of goods, unless inconsistent with it¹⁴.

1 See the Supply of Goods and Services Act 1982 ss 1-5A (ss 1, 4, 5 as amended; and s 5A as added); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 32, 70 et seq, 468.

2 Ibid s 1(1) (s 1(1), (3) amended by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(2)).

3 Supply of Goods and Services Act 1982 s 1(2)(a). As to the meaning of 'goods' see para 50 ante. 'Transferee', in relation to a contract for the transfer of goods, means (depending on the context) a person to whom the property in the goods is transferred under the contract, or a person to whom the property is to be so transferred, or a person to whom the rights under the contract of either of those persons have passed: s 18(1). 'Transferor', in relation to a contract for the transfer of goods, means (depending on the context) a person who transfers the property in goods under the contract, or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed: s 18(1).

4 Ibid s 1(2)(b). As to the meaning of 'hire-purchase agreement' see para 50 note 12 ante.

5 Ibid s 1(2)(c). As to the meanings of 'trading stamps' and 'redemption' see para 50 note 13 ante.

6 Ibid s 1(2)(d).

7 Ibid s 1(2)(e).

8 See ibid s 1(2); and the text and notes 3-7 supra.

9 Ibid s 1(3) (as amended: see note 2 supra).

10 See para 63 ante.

11 is subject to the Supply of Goods and Services Act 1982 s 11(2) (see the text and note 14 infra) and the Unfair Contract Terms Act 1977 (see CONTRACT vol 9(1) (Reissue) para 820 et seq).

12 Supply of Goods and Services Act 1982 s 11(1).

13 See the text and note 1 supra.

14 Supply of Goods and Services Act 1982 s 11(2). Nothing in ss 1-5A (ss 1, 4, 5 as amended; and s 5A as added) prejudices the operation of any other enactment or rule of law whereby any condition or warranty (other than one in relation to quality or fitness) is to be implied in a contract for the transfer of goods: s 11(3).

UPDATE

71-76 Delegation ... Sample

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

72 Liability for materials supplied by workman

TEXT AND NOTE 5--Head (3) omitted: Regulatory Reform (Trading Stamps) Order 2005, SI 2005/871.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/73. Right to transfer goods.

73. Right to transfer goods.

In a contract for the transfer of goods¹, except as otherwise provided², there is: (1) an implied condition on the part of the transferor³ that in the case of a transfer of the property in the goods he has a right to transfer the property and in the case of an agreement to transfer the property in the goods that he will have such a right at the time when the property is to be transferred⁴; (2) an implied warranty that the goods are free, and will remain free until the time when the property is to be transferred, from any charge or encumbrance not disclosed or known to the transferee⁵ when the contract is made⁶; (3) an implied warranty that the transferee will enjoy quiet possession of the goods, except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the transferee when the contract is made⁷.

In a contract for the transfer of goods, in the case of which there appears from the contract, or there is to be inferred from its circumstances, an intention that the transferor should transfer only such title as he or a third person may have⁸, there is: (a) an implied warranty that all charges or encumbrances known to the transferor and not known to the transferee have been disclosed to the transferee before the contract is made⁹; (b) an implied warranty that the transferee's quiet possession of the goods will not be disturbed by any of the following: (i) the transferor¹⁰; (ii) in a case where the parties intend that the transferor should transfer only such title as a third person may have, that person¹¹; or (iii) anyone claiming through or under the transferor or through or under that third person, otherwise than under a charge or encumbrance disclosed or known to the transferee before the contract is made¹².

Provision is made for the exclusion or restriction of liability for breach of these implied terms¹³.

- 1 For the meaning of 'contract for the transfer of goods' see para 72 ante.
- 2 le by the Supply of Goods and Services Act 1982 s 2(3)-(5): see the text and notes 8-12 infra.
- 3 For the meaning of 'transferor' see para 72 note 3 ante.
- 4 Supply of Goods and Services Act 1982 s 2(1). See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 70.
- 5 For the meaning of 'transferee' see para 72 note 3 ante.
- 6 Supply of Goods and Services Act 1982 s 2(2)(a). See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 70.
- 7 Ibid s 2(2)(b). See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 70.
- 8 Ibid s 2(3).
- 9 Ibid s 2(4).
- 10 Ibid s 2(5)(a).
- 11 Ibid s 2(5)(b).
- 12 Ibid s 2(5)(c).
- 13 See ibid s 11(1), (2); the Unfair Contract Terms Act 1977; para 72 text and notes 11-14 ante; and CONTRACT vol 9(1) (Reissue) para 820 et seq.

UPDATE

71-76 Delegation ... Sample

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/74. Correspondence with description.

74. Correspondence with description.

Where, under a contract for the transfer of goods¹, the transferor² transfers or agrees to transfer the property by description³, there is an implied condition that the goods will correspond with the description⁴. If the transferor transfers or agrees to transfer the property by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description⁵.

Provision is made for exclusion of these implied terms⁶ and also for modification of remedies for breach of statutory condition in non-consumer cases⁷.

- 1 For the meaning of 'contract for the transfer of goods' see para 72 ante.
- 2 For the meaning of 'transferor' see para 72 note 3 ante.

3 Supply of Goods and Services Act 1982 s 3(1). A contract is not prevented from being a contract by description by reason only that, being exposed for supply, the goods are selected by the transferee: s 3(4). For the meaning of 'transferee' see para 72 note 3 ante.

4 Ibid s 3(2).

5 Ibid s 3(3).

6 See ibid s 11; the Unfair Contract Terms Act 1977; para 72 ante; and CONTRACT vol 9(1) (Reissue) para 820 et seq.

7 Where in the case of a contract for the transfer of goods the transferee would have the right to treat the contract as repudiated by reason of a breach on the part of the transferor of a term implied by the Supply of Goods and Services Act 1982 ss 3, 4 (as amended) (see para 75 post) or s 5(2)(a) or (c) (as amended) (see para 76 post), but the breach is so slight that it would be unreasonable for him to do so, then, if the transferee does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty: s 5A(1) (s 5A added by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(5)). The Supply of Goods and Services Act 1982 s 5A (as added) applies unless a contrary intention appears in, or is to be implied from, the contract: s 5A(2) (as so added). It is for the transferor to show that a breach is so slight as indicated in s 5A(1) (as added): s 5A(3) (as so added). As to the meaning of 'dealing as consumer' see para 54 note 7 ante. See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 75.

UPDATE

71-76 Delegation ... Sample

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/75. Satisfactory quality.

75. Satisfactory quality.

Except as otherwise provided by the Supply of Goods and Services Act 1982¹, and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract for the transfer of goods².

Where, under such a contract, the transferor³ transfers the property in goods in the course of a business⁴, there is an implied condition that the goods supplied under the contract are of satisfactory quality⁵. This implied condition, however, does not extend to any matter making the quality of goods unsatisfactory: (1) which is specifically drawn to the transferee's attention before the contract is made; (2) where the transferee examines the goods before the contract is made, which that examination ought to reveal; or (3) where the property in the goods is transferred by reference to a sample⁶, which would have been apparent on a reasonable examination of the sample⁷.

If, under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business and the transferee, expressly or by implication, makes known to the transferor, or, where the consideration or part of the consideration for the transfer is a sum payable by instalments and the goods were previously sold by a credit-broker⁸ to the transferor, to that credit-broker, any particular purpose for which the goods are being acquired⁹, then there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are

commonly supplied¹⁰. This provision does not apply, however, where the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit-broker¹¹.

An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the transfer of goods¹².

The provisions described above apply to a transfer by a person who in the course of a business is acting as agent for another as they apply to a transfer by a principal in the course of a business, except where that other is not transferring in the course of a business and either the transferee knows that fact or reasonable steps are taken to bring it to the transferee's notice before the contract concerned is made¹³.

Provision is made for the exclusion of these terms¹⁴ and also for modification of remedies for breach of statutory condition in non-consumer cases¹⁵.

1 le by the Supply of Goods and Services Act 1982 s 4 (as amended) (see the text and notes 2-13 *infra*), s 5 (as amended) (see para 76 *post*).

2 Ibid s 4(1). For the meaning of 'contract for the transfer of goods' see para 72 *ante*. See also para 69 *ante*.

3 For the meaning of 'transferor' see para 72 note 3 *ante*.

4 As to the meaning of 'business' see para 55 note 4 *ante*.

5 Supply of Goods and Services Act 1982 s 4(2) (substituted by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(3)). For these purposes and for the purposes of the Supply of Goods and Services Act 1982 s 5 (as amended) (see para 76 *post*), goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other circumstances: s 4(2A) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(3)). If the transferee deals as consumer, the relevant circumstances mentioned in s 4(2A) (as added) include any public statements on the specific characteristics of the goods made about them by the transferor, the producer or his representative, particularly in advertising or on labelling: s 4(2B) (s 4(2B)-(2D) added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 7). A public statement is not by virtue of the Supply of Goods and Services Act 1982 s 4(2B) (as added) a relevant circumstance for the purposes of s 4(2A) (as added) in the case of a contract for the transfer of goods, if the transferor shows that: (1) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement; (2) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public; or (3) the decision to acquire the goods could not have been influenced by the statement: s 4(2C) (as so added). The provisions of s 4(2B), (2C) (as added) do not prevent any public statement from being a relevant circumstance for the purposes of s 4(2A) (as added) (whether or not the transferee deals as consumer) if the statement would have been such a circumstance apart from those provisions: s 4(2D) (as so added). For the meaning of 'transferee' see para 72 note 3 *ante*. For the meaning of 'consumer' see para 55 note 5 *ante*.

6 As to samples see para 76 *post*.

7 Supply of Goods and Services Act 1982 s 4(3) (substituted by the Sale and Supply of Goods Act 1994 Sch 2 para 6(3)).

8 For the meaning of 'credit-broker' see para 55 note 9 *ante*.

9 Supply of Goods and Services Act 1982 s 4(4).

10 Ibid s 4(5).

11 Ibid s 4(6).

12 Ibid s 4(7). See also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 83.

13 Ibid s 4(8).

14 See *ibid* s 11; the Unfair Contract Terms Act 1977 s 7 (as amended); para 72 *ante*; and CONTRACT vol 9(1) (Reissue) para 820 *et seq*.

15 See the Supply of Goods and Services Act 1982 s 5A (as added); para 74 note 7 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 85.

UPDATE

71-76 Delegation ... Sample

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(iii) Workman's Obligations/76. Sample.

76. Sample.

Where, under a contract for the transfer of goods¹, the transferor² transfers or agrees to transfer the property in the goods by reference to a sample³, there is: (1) an implied condition that the bulk will correspond with the sample in quality⁴; (2) an implied condition that the transferee⁵ will have a reasonable opportunity of comparing the bulk with the sample⁶; and (3) an implied condition that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample⁷.

Provision is made for the exclusion of these terms⁸ and also for modification of remedies for breach of statutory condition in non-consumer cases⁹.

1 For the meaning of 'contract for the transfer of goods' see para 72 ante.

2 For the meaning of 'transferor' see para 72 note 3 ante.

3 For this purpose, a transferor transfers or agrees to transfer goods by reference to a sample where there is an express or implied term to that effect in the contract concerned: Supply of Goods and Services Act 1982 s 5(4).

4 Ibid s 5(2)(a).

5 For the meaning of 'transferee' see para 72 note 3 ante.

6 Supply of Goods and Services Act 1982 s 5(2)(b).

7 Ibid s 5(2)(c) (amended by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 6(4)(b), Sch 3). See also the Supply of Goods and Services Act 1982 s 4(2A) (as added); and para 75 note 5 ante. Cf para 55 note 5 ante; and see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 95.

8 See ibid s 11; the Unfair Contract Terms Act 1977 s 7 (as amended); para 72 text and notes 11-14 ante; and CONTRACT vol 9(1) (Reissue) para 820 et seq.

9 See the Supply of Goods and Services Act 1982 s 5A (as added); para 74 note 7 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 95.

UPDATE

71-76 Delegation ... Sample

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/ (iv) Lien/77. Workman's lien.

(iv) Lien

77. Workman's lien.

Everyone to whom a chattel is delivered in order that he may, for reward, do work upon it, and who does work upon the chattel which improves it¹, has at common law a lien on the chattel for the amount of the remuneration due to him for the work done, and therefore is not bound to restore it until his remuneration is paid², unless that lien is excluded by express agreement or is otherwise inconsistent with the express or implied terms of the contract³. But if a chattel is bailed to a workman for the sole purpose of his working with it, and not upon it, no lien attaches⁴.

This lien applies, apart from agreement, only to the sum actually due to the workman for materials and labour expended by him in connection with the repair or alteration of the chattel, and does not extend to charges for warehousing⁵. Nor will the fact that the owner of the chattel is aware that an additional charge will be made for each day during which his property is detained in the valid exercise of the lien suffice to render him liable for such charges. Thus the owner of a ship who knew that he must pay for dock room while the vessel was being repaired was held to have made no implied promise to pay any additional charge for the period during which his vessel was detained as security for the shipwright's charges, although he had received notice that such charges would be made⁶.

Should the owner sell the chattel bailed, the workman's lien *prima facie* attaches only for the amount of the debt due to him at the time when he has notice of the sale, and not for any after-accruing debt⁷.

1 See *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621 (where an agreement by defendants for three years to maintain plaintiff's car, supplying all petrol and other things necessary for the running of the car and a driver, was held to give no lien). See also *Re Southern Livestock Producers Ltd* [1963] 3 All ER 801, [1964] 1 WLR 24.

2 *Re Matthews, ex p Ockenden* (1754) 1 Atk 235; *Franklin v Hosier* (1821) 4 B & Ald 341; *Hollis v Claridge* (1813) 4 Taunt 807; *Scarfe v Morgan* (1838) 4 M & W 270; *Blake v Nicholson* (1814) 3 M & S 167; *Chase v Westmore* (1816) 5 M & S 180; Story on Bailments (9th Edn, 1878) s 440; Palmer *Bailment* (2nd Edn, 1991) pp 943-958. See also para 48 text to note 26 ante. See further LIEN vol 68 (2008) PARA 841 et seq.

3 *Raitt v Mitchell* (1815) 4 Camp 146; *Chase v Westmore* (1816) 5 M & S 180 at 186 per Lord Ellenborough CJ; *Scarfe v Morgan* (1838) 4 M & W 270 at 283 per Parke B; *Forth v Simpson* (1849) 13 QB 680; *Wilson v Lombank Ltd* [1963] 1 All ER 740, [1963] 1 WLR 1294; and contrast *Re Westlake, ex p Willoughby* (1881) 16 ChD 604.

4 *Steadman v Hockley* (1846) 15 M & W 553 at 556 per Pollock CB; *Bleaden v Hancock* (1829) 4 C & P 152; *Welsh Development Agency (Holdings) Ltd v Modern Injection Mouldings Ltd* (6 March 1986, unreported).

5 *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338; *Morris v Beaconsfield Motors Ltd* [2001] EWCA Civ 1322; *Bruce v Everson* (1883) Cab & El 18; *Hartley v Hitchcock* (1816) 1 Stark 408; and see para 48 ante. The position may be otherwise where the workman retains possession of the goods predominantly for the benefit of the hirer: see *China-Pacific SA v Food Corpn of India, The Winson* [1982] AC 939 at 962-963, [1981] 3 All ER 688 at 696, HL, per Lord Diplock, and at 964 and 697 per Lord Simon of Glaisdale (where the point was left open).

6 *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338; and see para 48 ante.

7 *Barry v Longmore* (1840) 4 Per & Dav 344.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/ (iv) Lien/78. Lien of third parties.

78. Lien of third parties.

When a bailee of goods delivers them to a third party to do work upon them, and the circumstances¹ are such as to support the implication that he had the owner's authority to do so, as when he expressly agrees with his bailor to keep the chattel bailed from injury, and this term in the agreement necessarily implies its repair by a third party, or a trade custom in that behalf can be proved, the third party who does the work on the bailee's order has an effective lien on the chattel against the owner, although there may have been no privity of contract between the owner and himself². It seems that a lien will also attach against the owner in favour of a third party to whom the bailee has delivered goods, even in the absence of authority from the owner to the bailee to do so, if the third party was under a common law obligation to receive the goods, as for example where he is a carrier or an innkeeper³. Where, however, the third party is not under such an obligation, he will have no lien in the absence of an implied (or, possibly, an ostensible⁴) authority on the bailee's part to deliver the goods to him⁵.

1 Such circumstances commonly arise where a car is let under a hire-purchase agreement. The hirer has a right to pass it to a third party for repair: see *Bowmaker Ltd v Wycombe Motors Ltd* [1946] KB 505 at 509, [1946] 2 All ER 113 at 115; and para 48 text to note 26 ante. See also *Tappenden v Artus* [1964] 2 QB 185, [1963] 3 All ER 213, CA (implied authority for repairs necessary to make car roadworthy).

2 *Keene v Thomas* [1905] 1 KB 136; *Green v All Motors Ltd* [1917] 1 KB 625, CA; *Albemarle Supply Co Ltd v Hind & Co* [1928] 1 KB 307, CA, where it was held that the lien attached although it was stipulated that the bailee should have no right to create a lien in respect of the repairs to the chattel by a third party, the third party having no notice of this limitation on the bailee's authority; *Cassils & Co and Sassoon & Co v Holden Wood Bleaching Co Ltd* (1914) 84 LJB 834, CA, where the third party failed to prove the authority of the owner. See also *K Chellaram & Sons (London) Ltd v Butlers Warehousing and Distribution Ltd* [1978] 2 Lloyd's Rep 412, CA (bailee container shipping line delivered goods to third party for purposes of packing into containers); *Jarl Trä AB v Convoys Ltd* [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep 459.

3 *Singer Manufacturing Co v London and South Western Rly Co* [1894] 1 QB 833 at 837, DC, per Collins J, who based the lien, inter alia, upon a railway company's obligation to give reasonable facilities for the receipt and safe custody of baggage. But see *Pennington v Reliance Motor Works Ltd* [1923] 1 KB 127 at 129 per McCardie J; and see para 48 ante.

4 *Tappenden v Artus* [1964] 2 QB 185 at 195-196, [1963] 3 All ER 213 at 216, CA, per Diplock LJ (obiter).

5 *Hiscox v Greenwood* (1802) 4 Esp 174; *Buxton v Baughan* (1834) 6 C & P 674; *Cassils & Co and Sassoon & Co v Holden Wood Bleaching Co Ltd* (1914) 84 LJB 834, CA; *Pennington v Reliance Motor Works Ltd* [1923] 1 KB 127; *Bowmaker Ltd v Wycombe Motors Ltd* [1946] KB 505, [1946] 2 All ER 113 (bailee's authority under hire-purchase agreement terminated by termination of the agreement).

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/ (iv) Lien/79. Loss of lien.

79. Loss of lien.

The lien is lost by a relinquishment of possession on the part of the workman¹, or by any act or agreement amounting to waiver².

1 *Jacobs v Latour* (1828) 5 Bing 130; *Hartley v Hitchcock* (1816) 1 Stark 408; *Legg v Evans* (1840) 6 M & W 36 at 42 per Parke B; *Sweet v Pym* (1800) 1 East 4; *Pennington v Reliance Motor Works Ltd* [1923] 1 KB 127; *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621. Contrast *Albemarle Supply Co Ltd v Hind & Co* [1928] 1 KB 307, CA.

2 *White v Gainer* (1824) 2 Bing 23; *Morris v Beaconsfield Motors Ltd* [2001] EWCA Civ 1322. As to the position where the bailor countermands the work before its completion see *Lilley v Barnsley* (1844) 1 Car & Kir 344; *Green v All Motors Ltd* [1917] 1 KB 625 at 633-634, CA, per Scrutton LJ; *Cremer v General Carriers Ltd* [1974] 1 All ER 1, [1974] 1 WLR 341; cf *Bolwell Fibreglass Pty Ltd v Foley* [1984] VR 97, Vict SC. See Palmer *Bailment* (2nd Edn, 1991) pp 952-954.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(3) HIRE OF WORK AND LABOUR/(v) Disposal of Uncollected Goods/80. Power to sell uncollected goods.

(v) Disposal of Uncollected Goods

80. Power to sell uncollected goods.

There is provision¹ for sale by the bailee of goods in his possession or under his control where: (1) the bailor is in breach of an obligation to take delivery of them² or, if the terms of the bailment so provide, to give directions for their delivery; or (2) the bailee could impose such an obligation³ by giving notice to the bailor but is unable to trace or communicate with him; or (3) the bailee can reasonably expect to be relieved of any duty to safeguard the goods on giving notice to the bailor, but is unable to trace or communicate with him⁴. The bailee's power can be exercised only if he has either given notice to the bailor of his intention to sell the goods⁵ or he has failed to trace or communicate with him with a view to giving such notice after having taken reasonable steps for the purpose⁶, and if he is reasonably satisfied that the bailor owns the goods⁷. The bailee is liable to account to the bailor for any proceeds of sale less any costs incurred⁸. Such a sale gives a good title to the purchaser as against the bailor⁹ but where the bailor is not in fact the owner, does not give good title against the owner or a person claiming under him¹⁰.

Where a bailee of goods to which these provisions apply satisfies the court that he is entitled to sell the goods, or would be had he given notice¹¹, the court may: (1) authorise the sale subject to any conditions; (2) authorise the bailee to deduct from the proceeds any costs of sale and any amount due to him from the bailor; and (3) direct the payment of the net proceeds into court to be held for the bailor¹².

1 The provisions of the Torts (Interference with Goods) Act 1977 s 12 do not apply where the goods were bailed before the commencement of that Act: s 12(9); *Anderson and Anderson v Earlander* [1980] CLY 133. As to the commencement of the Torts (Interference with Goods) Act 1977 see the orders made under s 17(2); and TORT vol 45(2) (Reissue) para 546.

2 For examples of cases where such an obligation was held to have been broken see *Pedrick v Morning Star Motors Ltd* (14 February 1979, unreported), CA; *Ridyard v Roberts* (16 May 1980, unreported), CA; *Jerry Juhan Developments SA v Avon Tyres Ltd* (1999) Times, 25 January.

3 The bailee under any sort of bailment can impose an obligation on the bailor to collect goods by issuing written notice where those goods have been accepted for repair or other treatment, or for valuation or appraisal, or where they have been put in the bailee's custody and his obligation as custodian is over: Torts (Interference with Goods) Act 1977 s 12(2), Sch 1 Pt I paras 2-5. The notice must: (1) specify the bailee's name and address, and particulars of the goods and the address at which they are held; (2) state that the goods are

ready or will be ready at the termination of the contract; and (3) specify the amount, if any, due to the bailee in respect of the goods before the giving of the notice: Sch 1 Pt I para 1(3). The notice must be issued after the repair, valuation or appraisal has been carried out, or after the ending of the obligation to act as custodian (or at the same time as any notice terminating the obligation as custodian): see Sch 1 Pt I paras 2-4. As to the form and delivery of the notice see Sch 1 Pt I para 1(2).

4 Ibid s 12(1). The provisions of s 12 and Sch 1 have effect subject to the terms of the bailment: s 12(8). For the purposes of ss 12, 13 (as amended) and Sch 1, 'bailor' and 'bailee' include their respective successors in title: s 12(7)(a). References to what is payable, paid or due to the bailee in respect of the goods include references to what would be payable by the bailor to the bailee as a condition of delivery of the goods at the relevant time: s 12(7)(b).

5 Ibid s 12(3)(a). Notice of intention to sell must be in writing, and must be sent by registered letter or recorded delivery service (Sch 1 Pt II para 6(4)); and the notice must specify the name and address of the bailee, give sufficient particulars of the goods and the address or place where they are held, specify the date on or after which the bailee proposes to sell the goods, and specify the amount if any due to the bailee in respect of the goods before the giving of the notice (Sch 1 Pt II para 6(1)). The interval between the giving of notice and proposed sale must be long enough to allow the bailor a reasonable opportunity of taking delivery of the goods and, if any amount is due to the bailee in respect of the goods, the interval must be at least three months: Sch 1 Pt II para 6(2), (3).

The bailee may not give notice or exercise his right to sell the goods pursuant to such a notice if he has notice that the bailor is questioning or refusing to pay all or some of the sum the bailee claims is due in respect of the goods because of a dispute concerning those goods: see Sch 1 Pt II para 7.

6 Ibid s 12(3)(b).

7 Ibid s 12(3).

8 Ibid s 12(5). The account must be taken on the footing that the bailee has adopted the best method of sale reasonably available in the circumstances: s 12(5)(a). Where s 12(3)(a) applies (see the text and note 5 supra), any sum payable to the bailee in respect of goods, which accrued before notice of intention to sell was given, is deductible from the proceeds of sale: s 12(5)(b).

9 Ibid s 12(6).

10 Ibid s 12(4).

11 I.e. notice under ibid Sch 1: see the text and notes 1-5 supra.

12 Ibid s 13(1). A decision of the court is conclusive, subject to any right of appeal, of the bailee's entitlement to sell the goods, as against the bailor, and gives the purchaser good title against the bailor: s 13(2). The county court has jurisdiction save that in Northern Ireland a county court only has jurisdiction if the value of the goods does not exceed the county court limit mentioned in the County Courts (Northern Ireland) Order 1980, SI 1980/397, art 10(1): Torts (Interference with Goods) Act 1977 s 13(3) (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1), (8), Schedule). See COURTS.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/3. BAILMENT FOR VALUABLE CONSIDERATION/(4) PLEDGE/81. Nature of pledge.

(4) PLEDGE

81. Nature of pledge.

The remaining class of bailment for valuable consideration is pledge¹, whereby a chattel is delivered to a bailee to be held by him as security for a debt or other engagement². The subject of pledge is dealt with elsewhere in this work³.

1 I.e. *pignus*, or *vadium*: see para 2 ante.

2 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 913 per Holt CJ; Jones on Bailments (4th Edn, 1833) p 36; Story on Bailments (9th Edn, 1878) s 286. See also *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA

Civ 731, [2004] QB 286, [2003] 3 All ER 561 (where the issue was whether an auctioneer was holding a painting (which he did not know was stolen) as pledgee or party akin to a pledgee).

3 See PLEDGES AND PAWNS.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/(1) ESTOPPEL OF BAILEE/82. Estoppel.

4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT

(1) ESTOPPEL OF BAILEE

82. Estoppel.

At common law¹, a bailee is estopped from setting up against his bailor's demand for a redelivery of the chattel bailed the right or title of a third person to the property in it².

This estoppel ceases, however, when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount³; and the bailee is thereby discharged from all liability to the bailor, unless there is a special contract, or the bailee is in some way to blame for the eviction⁴. It is not enough that the bailee has become aware of the title of a third person, or that an adverse claim has been made upon him⁵. Unless he has been actually evicted he can set up the title of a third person only where he does so on behalf and on the express authority of that third person⁶. Requests for information may not be administered by a bailee to his bailor for the purpose of showing that the bailor has parted with his title in the chattel to a third person, unless the bailee justifies his detention of it by setting up the title of such third person with his consent⁷.

This estoppel appears to have been substantially abrogated by statute. The defendant in a claim for wrongful interference with goods⁸ is entitled to show, in accordance with rules of court⁹, that a third person has a better right than the claimant as respects all or any part of the interest claimed by the claimant, or in right of which he sues¹⁰. The bailee's estoppel may be preserved, however, where the bailor sues otherwise than in tort¹¹.

1 The common law rule is substantially abrogated by statute: see the Torts (Interference with Goods) Act 1977 s 8; and the text and notes 8-10 infra. See also para 84 text and notes 11-15 post.

2 *Biddle v Bond* (1865) 6 B & S 225; *Betteley v Reed* (1843) 4 QB 511; *Re Sadler, ex p Davies* (1881) 19 ChD 86, CA; *Leese v Martin* (1873) LR 17 Eq 224; *China-Pacific SA v Food Corp'n of India, The Winson* [1982] AC 939 at 959, [1981] 3 All ER 688 at 694, HL, per Lord Diplock; *Redler Grain Silos Ltd v BICC Ltd* [1982] 1 Lloyd's Rep 435 at 438, CA, per Kerr LJ, and at 440 per Stephenson LJ. See further ESTOPPEL. The rule might in theory principle apply as between a sub-bailee and a head bailor, as well as between the sub-bailee and his head bailee, though a double estoppel may raise difficult issues and the question is not settled: *The Hamburg Star* [1994] 1 Lloyd's Rep 399, QB (point arguable). This rule does not apply to hire-purchase: *Karflex Ltd v Poole* [1933] 2 KB 251; and see CONSUMER CREDIT vol 9(1) (Reissue) para 23 et seq.

3 *Biddle v Bond* (1865) 6 B & S 225 at 234 per Blackburn J.

4 *Ross v Edwards & Co* (1895) 73 LT 100, PC.

5 *Betteley v Reed* (1843) 4 QB 511 at 517 per Lord Denman CJ; *Leese v Martin* (1873) LR 17 Eq 224.

6 *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318 at 325, CA, per Lord Esher MR. See also *Thorne v Tilbury* (1858) 3 H & N 534 at 539 per Bramwell B, and at 540 per Watson B, expressing the opinion that the bailee may show that the bailor's title has expired since the bailment. This opinion is adopted by Lopes LJ in *Rogers, Sons & Co v Lambert & Co* supra at 328. Cf *Webb v Ireland and A-G* [1988] IR 353, Ir SC (bailee acquiring title from third party). Where a plaintiff failed to recover property from a bailee because she did not establish a gift to herself from a predecessor in title, the bailee was precluded, in proceedings by the personal

representatives of the predecessor in title, from asserting against them that the property belonged to the former plaintiff: *Re Savoy Estate Ltd, Remnant v Savoy Estate Ltd* [1949] Ch 622, [1949] 2 All ER 286, CA.

7 *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318, CA. Cf *Webb v Ireland and A-G* [1988] IR 353 Ir SC.

8 The trespass to goods, conversion (or trover), negligence so far as it results in damage to goods or an interest in goods, and any other tort so far as it results in damage to goods or an interest in goods: see the Torts (Interference with Goods) Act 1977 s 8(1). As to the scope of the Torts (Interference with Goods) Act 1977 see TORT vol 45(2) (Reissue) para 545.

9 See TORT vol 45(2) (Reissue) paras 644, 678.

10 Torts (Interference with Goods) Act 1977 s 8(1). This provision also states that any rule of law to the contrary (sometimes called *jus tertii*) is abolished. See also paras 84, 89 post; and TORT vol 45(2) (Reissue) paras 644, 678. For procedural rules concerning parties in claims for wrongful interference with goods, and the power of the court to order, in certain circumstances, that certain persons be deprived of the right to bring a claim against the defendant, see CPR 19.5A; and CIVIL PROCEDURE.

11 See TORT vol 45(2) (Reissue) paras 644, 678.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/(1) ESTOPPEL OF BAILEE/83. Interpleader.

83. Interpleader.

If a third person claims the chattel and threatens the bailee with proceedings, and the bailor nevertheless insists on his title, the bailee may interplead¹.

A bailee who forbears to interplead makes himself a party to a possibly wrongful detention by retaining the chattel for the bailor, and he must then stand or fall by the bailor's title². Conversely, if he allows the third person to obtain the chattel, he may be liable to the bailor³.

1 As to interpleader see CPR Sch 1 RSC Ord 17; CPR Sch 2 CCR Ord 33; and CIVIL PROCEDURE vol 12 (2009) PARA 1585 et seq. Where there are competing claims made to goods held by a bailee, a bailee may interplead or he may invoke the procedure set out in the Torts (Interference with Goods) Act 1977 s 8: see para 89 post; and TORT vol 45(2) (Reissue) para 644. See *Redler Grain Silos Ltd v BICC Ltd* [1982] 1 Lloyd's Rep 435 at 438, CA, per Kerr LJ, and at 440 per Stephenson LJ. For procedural rules concerning parties in claims for wrongful interference with goods, and the power of the court to order, in certain circumstances, that certain persons be deprived of the right to bring a claim against the defendant, see CPR 19.5A; and CIVIL PROCEDURE.

2 *Wilson v Anderton* (1830) 1 B & Ad 450 at 456 per Lord Tenterden CJ.

3 *Ranson v Platt* [1911] 2 KB 291, CA.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/(1) ESTOPPEL OF BAILEE/84. Attornment.

84. Attornment.

At common law, where a bailee in possession of goods attorns to a person other than his original bailor, he becomes the bailee of that person¹. It would appear that he holds the goods as the attornee's bailee on the same terms as those on which he held them for the original bailor². Subject to those terms, the attornee can recover damages from the bailee for any tort which the bailee commits against the chattel after his attornment³.

At common law⁴, the bailee who attorns is estopped from denying the attornee's title⁵. He cannot impugn the attornee's title by pleading that a superior title resides in a third party⁶. The rule applies even though the chattel comes into the bailee's possession after he has agreed to attorn; although an attornment made by a person out of possession has no immediate effect, it applies when he obtains possession⁷.

As a general rule, to perfect an attornment, the goods must be specific, or there must be a specific appropriation so as to make them specific⁸. But on a sale of goods, where the seller has acknowledged the buyer's right to dispose of goods remaining in the seller's possession, the seller cannot subsequently defeat the right of a third person claiming under the buyer on the ground that, by reason of the want of any specific appropriation, no property has passed to the buyer and thus to that person⁹. Similarly, where the bailee of a seller attorns to a buyer in respect of a specified portion of an undivided parcel, he is estopped from denying the buyer's claim to the portion, notwithstanding that it has not been specifically appropriated from the parcel¹⁰.

The common law rule that a bailee is estopped from pleading the *jus tertii* has been substantially abrogated by statute¹¹. The defendant in a claim for wrongful interference with goods¹² is entitled to show, in accordance with rules of court¹³, that a third person has a better right than the claimant as respects all or any part of the interest claimed by the claimant, or in right of which he sues¹⁴. The bailee's estoppel may survive, however, where the attornee elects to sue otherwise than in tort¹⁵.

1 *Hawes v Watson* (1824) 2 B & C 540; *Gosling v Birnie* (1831) 7 Bing 399; *Henderson & Co v Williams* [1895] 1 QB 521 at 529, CA, per Lord Halsbury; Palmer *Bailment* (2nd Edn, 1991) ch 21.

2 *Leigh & Silavan v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 812, [1986] 2 All ER 145 at 151, HL, per Lord Brandon of Oakbrook (obiter); *Compania Portoraffi Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 404-405, CA, per Bingham LJ (obiter); *HMF Humphrey Ltd v Baxter, Hoare & Co Ltd* (1933) 149 LT 603; *Britain and Overseas Trading (Bristles) Ltd v Brooks Wharf and Bull Wharf Ltd* [1967] 2 Lloyd's Rep 51 at 60 per Widgery J (obiter); *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341. See also *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA; *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2003] 2 All ER 785, [2003] 2 WLR 711.

3 *Henderson & Co v Williams* [1895] 1 QB 521 at 530, CA, per Lord Halsbury (in a case of conversion, damages are prima facie to be estimated at the market value of the goods at the date of conversion). As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq.

4 The common law rule has been substantially abrogated by statute: see the Torts (Interference with Goods) Act 1977 s 8(1); and the text and notes 11-15 infra.

5 See the cases cited in note 1 supra.

6 As to the right to plead *jus tertii* see paras 82 ante, 89 post; and TORT vol 45(2) (Reissue) para 644.

7 *Holl v Griffin* (1833) 10 Bing 246 at 248 per Tindal CJ; *Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141 at 146 per Hope JA, NSW CA; revsd on another ground (1984) 58 ALJR 389, PC.

8 *Unwin v Adams* (1858) 1 F & F 312; *Tanner v Scovell* (1845) 14 M & W 28; *Laurie and Morewood v John Dudin & Sons* [1926] 1 KB 223, CA.

9 *Woodley v Coventry* (1863) 2 H & C 164; cf *Ant Jurgens Margarinefabrieken v Louis Dreyfus & Co* [1914] 3 KB 40.

10 *Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141, NSW CA; revsd on another ground (1984) 58 ALJR 389, PC. Cf *Re London Wine Co (Shippers) Ltd* [1986] PCC 121; *Re Stapylton Fletcher Ltd* [1995] 1 All ER 192, [1994] 1 WLR 1181, [1994] BCC 532, Ch (Companies Court); *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 806, PC; and cf, as to sales of goods from bulk, the Sale of Goods (Amendment) Act 1995; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 134 et seq.

11 See the Torts (Interference with Goods) Act 1977 s 8(1); paras 82 ante, 89 post; and TORT vol 45(2) (Reissue) paras 644, 678.

12 The trespass to goods, conversion (or trover), negligence so far as it results in damage to goods or to an interest in goods, and any other tort so far as it results in damage to goods or to an interest in goods: see *ibid* s 1 (as amended); and TORT vol 45(2) (Reissue) para 545.

13 As to the power to make rules see *ibid* s 8(2); and TORT vol 45(2) (Reissue) para 644. This power is without prejudice to any other power of making rules of court: see s 8(3); and TORT vol 45(2) (Reissue) para 644. For procedural rules concerning parties in claims for wrongful interference with goods, and the power of the court to order, in certain circumstances, that certain persons be deprived of the right to bring a claim against the defendant, see CPR 19.5A; and CIVIL PROCEDURE.

14 See the Torts (Interference with Goods) Act 1977 s 8(1); para 89 post; and TORT vol 45(2) (Reissue) paras 644, 678.

15 See *ibid* s 8(1); para 89 post; and TORT vol 45(2) (Reissue) paras 644, 678.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/(2) CLAIMS AND DAMAGES/85. Demand for the goods.

(2) CLAIMS AND DAMAGES

85. Demand for the goods.

Generally, in a claim for wrongful detention of goods, it is necessary to show that a demand has been made for the goods¹. On the occasions when such a demand must be made, the claim will lie after the bailee has wrongfully refused or failed to comply with the demand². The bailee cannot justify or excuse his failure to comply with the demand merely by proving that the chattel is no longer in his control or custody, or in that of anyone over whom he can exercise control, if he parted with it without just cause³ or negligently lost it or allowed it to be destroyed⁴; but he is excused if he can show that his failure to return the chattel arises from its loss or destruction, before the demand for its return, without any default on his part⁵. If the chattel is lost or destroyed while it is wrongfully detained by him after the demand for its return, he is liable as an insurer⁶.

Where, before any demand has been made, the bailee has done an act amounting to conversion of the chattel, a demand is not necessary in order to entitle the bailor to sue him⁷.

1 See TORT vol 45(2) (Reissue) para 556 et seq; and see *Baldwin v Cole* (1704) 6 Mod Rep 212; *M'Combie v Davies* (1805) 6 East 538; *Alexander v Southey* (1821) 5 B & Ald 247 at 250 per Best J; *Jones v Dowle* (1841) 9 M & W 19; *Burroughes v Bayne* (1860) 5 H & N 296; *Pillot v Wilkinson* (1863) 2 H & C 72 (affd (1864) 3 H & C 345, Ex Ch). See also *Belsize Motor Supply Co v Cox* [1914] 1 KB 244; *Viscount Churchill v Whetnall, Lord Aberconway v Whetnall* (1918) 87 LJCh 524; *Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195, [1969] 2 All ER 504; *Howard E Perry & Co Ltd v British Railways Board* [1980] 2 All ER 579, [1980] 1 WLR 1375; *Finlayson v Taylor* (1983) 133 NLJ 720.

2 *Clayton v Le Roy* [1911] 2 KB 1031, CA, at 1052 per Farwell LJ; *Miller v Dell* [1891] 1 QB 468, CA, where the action was detinue or conversion and the cause of action was held to accrue from the date of demand for documents of title fraudulently taken from the plaintiff and deposited with the defendant's predecessor in title.

3 See para 40 ante.

4 See the Torts (Interference with Goods) Act 1977 s 2(2); *Jones v Dowle* (1841) 9 M & W 19 at 20 per Parke B; *Reeve v Palmer* (1858) 5 CBNS 84; *Genn v Winkel* (1912) 107 LT 434 at 437, CA, per Fletcher Moulton LJ; *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* (1990) Times, 7 March. It appears that in such a case time runs against the bailor's right of action from the date when the bailee parted with possession: see para 87 post. See also paras 40, 43 ante.

5 *Taylor v Caldwell* (1863) 3 B & S 826 at 838 per Blackburn J. As to the onus of proof see paras 6, 43 ante. See also para 60 ante. See further *Jackson (Edinburgh) Ltd v Constructors John Brown Ltd* 1965 SLT 37.

6 *Shaw & Co v Symmons & Sons* [1917] 1 KB 799.

7 See eg *Grainger v Hill* (1838) 4 Bing NC 212; and see para 18 ante. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq and as to conversion by bailees see TORT vol 45(2) (Reissue) para 605.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/(2) CLAIMS AND DAMAGES/86. Remedies and measure of damages.

86. Remedies and measure of damages.

There is a choice of remedies in bailment as it is a transaction sui generis¹ and a claim against a defaulting bailee may (according to circumstance) lie in contract, tort or bailment². The measure of damages is that appropriate to the cause of action. A restitutionary claim, grounded on either the bailor's or the bailee's unjust enrichment at the expense of the other, may also be available³.

Negligence and conversion are the principal torts committed by a defaulting bailee⁴. Damages are awarded according to the specific rules governing those torts. In each case, damages are normally compensatory⁵, the object being to restore the bailor to the position which he occupied before the tort was committed⁶. There is a broad degree of flexibility in assessing the damages payable⁷. In conversion, damages are usually (though there is no hard and fast rule) measured by the value of the chattel converted at the time of the conversion⁸, together with any consequential damage flowing from the conversion which is not too remote to be recoverable by law⁹. Recoverable consequential damages may include aggravated damages¹⁰, exemplary damages¹¹, and damages for inconvenience or loss of enjoyment¹², in addition to consequential monetary losses¹³. The time at which value is taken is generally the time most appropriate to achieve justice between the parties¹⁴; this may (according to circumstance) be the value at the date of judgment, or the value at the date of conversion, or the value at some intermediate date¹⁵.

Where a bailment arises by contract, the bailor may sue in contract to recover damages for loss of his expectation interest¹⁶. Subject to ordinary principles of remoteness¹⁷ (and other constraints)¹⁸, such damages will normally seek to put the bailor in the position which he would have occupied, had the breach not occurred¹⁹. This is the measure commonly applied in claims for breach of contracts of carriage, hire, storage or repair; and the same measure is likely to apply in claims for breach of a bailee's duty to insure the chattel²⁰. The bailor may alternatively claim for his reliance loss, that is, for costs or liabilities which he has incurred in reliance on the bailee's due performance of the contract, and which are now wasted by reason of the breach²¹. The normal principles of remoteness and other limiting factors govern such a claim²². Generally the bailor has an unfettered choice between the two forms of loss, and may even combine elements of each, provided this does not involve double claiming²³. However, reliance losses cannot be recovered where the bailee shows that their award would allow the bailor to escape from a bad bargain²⁴. Where a bailment is founded on contract, damages are likely to correspond to the measure awarded for breach of contract²⁵, even though the claim is for breach of bailment. Other than in a case of deviation²⁶ normal principles of remoteness are likely to apply²⁷.

Where a bailment is consensual but not contractual, and the bailor sues in bailment for breach of some express or implied promise by the bailee, a measure akin to that in contract may be awarded, subject to the bailee's contemplation²⁸.

In many claims (under both contractual and non-contractual bailment) the measure of damages in bailment will correspond with that in tort for negligence or conversion²⁹. The sum required to restore the bailor to the position which he occupied before the wrong was committed, and the sum required to put him in the position he would have occupied had bailment been performed, may in each case be the value of the chattel, together with incidental costs³⁰. In certain circumstances, a bailee who, in breach of bailment, detains the bailed chattel and uses or otherwise derives benefit from it must pay to the bailor a reasonable hire charge for the period of detention and use³¹.

A consignor of goods who is party to the contract of carriage³², but suffers no substantial loss from the carrier's breach as the property in the goods has passed from him before the breach occurred, cannot ordinarily recover substantial damages, because recovery would offend the general rule that damages are compensatory³³.

A right to substantial damages for the loss of, or damage to, goods can be proved by showing possession or ownership of the goods at the time of the wrong regardless of whether the goods are at the risk of the owner or possessor; here it is the loss to the proprietary or possessory interest that is compensated rather than some other or economic loss³⁴.

In a claim for the tort of negligence founded on the loss of, or damage to, goods, the claimant must show either the legal property in the goods³⁵, or a possessory title to them, at the time of loss or damage³⁷. Legal property confers a right to substantial damages, and a similar right exists where a bailor has a possessory right falling short of legal ownership in goods, and these goods are lost or damaged while in the bailee's possession³⁸.

Where, by reason of a bailee's actual or presumed fault, a bailor cannot prove the value of goods lost or destroyed, the highest possible value is presumed against the bailee³⁹.

Damages and related matters in regard to proceedings against third parties in respect of the destruction of, or damage to, the chattels bailed are discussed elsewhere in this title⁴⁰.

1 *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247 at 261-262, [1965] 1 All ER 163 at 167-168, CA, per Lord Denning MR. See also Palmer *Bailment* (2nd Edn, 1991) p 229.

2 *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86 at 90, CA, per Otton J. See also para 3 note 6 ante. As to damages in tort see DAMAGES vol 12(1) (Reissue) para 851 et seq. As to damages in contract see DAMAGES vol 12(1) (Reissue) para 941 et seq. As to damages in bailment see further DAMAGES vol 12(1) (Reissue) para 1088 et seq.

3 As to restitutionary claims by bailees, grounded on the unjust enrichment of bailors, see eg *China-Pacific SA v Food Corp of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL; *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534, [1936] 3 All ER 696, CA; and DAMAGES vol 12(1) (Reissue) para 1088. As to restitutionary claims by bailors, grounded on gains which have accrued to a bailee in breach by reason of the breach and which exceed the loss inflicted on the bailor, see DAMAGES vol 12(1) (Reissue) para 1099.

4 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 738, [1965] 2 All ER 725 at 739, CA, per Salmon LJ. As to negligence generally see NEGLIGENCE. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq.

5 *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247 at 261-262. See also para 46 ante; and DAMAGES vol 12(1) (Reissue) para 1091. The bailor recovers no more than his loss, which may, according to circumstance, be measured prospectively or retrospectively. In general, a bailor is entitled to recover the sum which will either put him in the position he should have occupied on performance or return him to the position he occupied before breach. As to compensation generally see DAMAGES vol 12(1) (Reissue) para 815 et seq.

6 *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1991] 2 All ER 129, [1990] 1 WLR 409.

7 *IBL Ltd v Coussens* [1991] 2 All ER 133, CA (conversion; full value awardable for 'irretrievable' conversion).

8 *Mercer v Jones* (1813) 3 Camp 477; *Reid v Fairbanks* (1853) 13 CB 692; *France v Gaudet* (1871) LR 6 QB 199 at 204, Ex Ch; *Solloway v McLaughlin* [1938] AC 247, [1937] 4 All ER 328, PC; *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1991] 2 All ER 129, [1990] 1 WLR 409, PC; *Chubb Cash Ltd v John Crilley & Son (a firm)*

[1983] 2 All ER 294, [1983] 1 WLR 599, CA, where it was held that the price reached at a subsequent sale of the converted chattel at a public auction was prima facie good evidence of its value at the date of the auction and, on the facts, good evidence of its value at the time of the earlier conversion. The claimant may be entitled to additional damages if the goods have risen in market value between the conversion and judgment, subject to the usual rules of mitigation: *Greening v Wilkinson* (1825) 1 C & P 625; *Johnson v Hook* (1883) 31 WR 812; *Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA; *Aitken v Gardiner and Watson* [1956] OR 589, 4 DLR (2d) 119 (Can). As to damages being the fall in market value of the goods between the date of conversion and the date of their return see *Trailways Transport Ltd v Thomas* [1996] 2 NZLR 443, NZ HC. See also *IBL Ltd v Coussens* [1991] 2 All ER 133, CA. See generally TORT vol 45(2) (Reissue) para 615 et seq. As to what constitutes market value see TORT vol 45(2) (Reissue) para 627. See also the text and notes 14-15 infra.

9 *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 2 All ER 314, [1963] 1 WLR 644, CA. See also *Douglas Valley Finance Co Ltd v S Hughes (Hirers) Ltd* [1969] 1 QB 738, [1966] 3 All ER 214; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, [2003] 2 Lloyd's Rep 172. As to damages flowing naturally and directly from the wrongful usurpation and conversion see *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209. See further TORT vol 45(2) (Reissue) para 630.

10 *Mafo v Adams* [1970] 1 QB 548 at 558, [1969] 3 All ER 1404 at 1410, CA, per Widgery LJ. See DAMAGES vol 12(1) (Reissue) para 1111 et seq.

11 *Cook v Saroukos* (1989) 97 FLR 33, Aust FC; *Egan v State Transport Authority* (1982) 31 SASR 481, S Aust SC (action in detinue by contractor for wrongful seizure of plant). As to the circumstances in which exemplary damages are available see *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL; *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL. See DAMAGES vol 12(1) (Reissue) para 1115 et seq.

12 *Harris v Lombard New Zealand Ltd* [1974] 2 NZLR 161 at 169-170; *Millar v Candy* (1981) 58 FLR 145 (Aust); and DAMAGES vol 12(1) (Reissue) para 957.

13 *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; and see para 62 ante.

14 *IBL Ltd v Coussens* [1991] 2 All ER 133, CA.

15 *IBL Ltd v Coussens* [1991] 2 All ER 133, CA.

16 As to bailment by contract see para 38 et seq ante. As to the expectation interest see DAMAGES vol 12(1) (Reissue) para 977 et seq.

17 As to remoteness of damage see DAMAGES vol 12(1) (Reissue) paras 1015-1034.

18 As to limiting factors see DAMAGES vol 12(1) (Reissue) para 1015 et seq.

19 See DAMAGES vol 12(1) (Reissue) para 977 et seq.

20 *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* (1990) Times, 7 March, QB. As to whether a bailee owes an obligation to insure the goods, see para 44 ante.

21 *CCC Films (London) Ltd v Impact Quadrant Films* [1985] QB 16, [1984] 3 All ER 298. As to reliance loss see DAMAGES vol 12(1) (Reissue) para 987 et seq.

22 See DAMAGES vol 12(1) (Reissue) para 1015 et seq.

23 As to double recovery see DAMAGES vol 12(1) (Reissue) para 948.

24 See DAMAGES vol 12(1) (Reissue) para 989.

25 As to damages in contract see DAMAGES vol 12(1) (Reissue) para 941 et seq.

26 As to deviation from the terms of the bailment see DAMAGES vol 12(1) (Reissue) para 1095.

27 Eg *McMahon v Field* (1881) 7 QBD 591, 50 LJQB 552, CA: see DAMAGES vol 12(1) (Reissue) para 1092. As to the normal principles of remoteness in a claim for breach of contract see DAMAGES vol 12(1) (Reissue) para 1015 et seq.

28 *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247, [1965] 1 All ER 163, CA. See also DAMAGES vol 12(1) (Reissue) para 1093.

29 See DAMAGES vol 12(1) (Reissue) para 1094. As to damages in tort generally see DAMAGES vol 12(1) (Reissue) paras 851 et seq.

30 As to damages in relation to chattels see DAMAGES vol 12(1) (Reissue) para 860 et seq. If the goods have been restored to their owner after a conversion the owner may be required to give credit for their value and his damages must accordingly be reduced by that amount: *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864 at 873, [1982] 1 All ER 28 at 34, CA, per Brandon LJ. See also *IBL Ltd v Coussens* [1991] 2 All ER 133, CA. The measure for damages is generally subject to an allowance for any increase in the value of the goods due to expenditure or work on them by the defendant: see the Torts (Interference with Goods) Act 1977 s 6; and TORT vol 45(2) (Reissue) para 623. See also the text to note 39 infra.

31 See *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 2 All ER 184, [1983] 1 WLR 959; *Gray's Truck Centre Ltd v Olaf L Johnson Ltd* (25 January 1990, unreported), CA; *Saleh Farid v Theodorou and Blacklake Securities* (30 January 1992, unreported), CA; *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 NSWLR 175; and DAMAGES vol 12(1) (Reissue) paras 1096-1099. See also para 62 ante.

32 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 752 et seq. See also *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; and DAMAGES vol 12(1) (Reissue) para 1105.

33 See *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; and DAMAGES vol 12(1) (Reissue) para 1105, where the principal exception to the proposition is discussed. Also see generally *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518, [2000] 4 All ER 97, HL.

34 See *Obestain Inc v National Mineral Development Corp Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465; and DAMAGES vol 12(1) (Reissue) para 1106. In a claim based on damage to a reversionary interest in goods, where the claimant lacked any immediate right of possession at the time of the wrong, the claimant must show some enduring impairment of the goods or of his reversionary interest in them: see *East West Corp v DKBS AF 1912 A/S, Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; and TORT.

35 Mere equitable property is insufficient unless accompanied by a possessory title: *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA, explaining *International Factors Ltd v Rodriguez* [1979] QB 351, [1979] 1 All ER 17, CA. See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 757; TORT.

37 *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 808, [1986] 2 All ER 145 at 148, HL, per Lord Brandon of Oakbrook. See further DAMAGES vol 12(1) (Reissue) para 1107.

38 See *Obestain Inc v National Mineral Development Corp Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465; and DAMAGES vol 12(1) (Reissue) para 1107.

39 See *Armory v Delamirie* (1722) 1 Stra 505; *Indian Oil Corp v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345, [1987] 3 All ER 893; and DAMAGES vol 12(1) (Reissue) para 1108. See also paras 13, 37 ante. As to changes in value and market value see notes 8, 30 supra.

40 See paras 88-91 post.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/(2) CLAIMS AND DAMAGES/87. Limitation of actions.

87. Limitation of actions.

A claim under the Torts (Interference with Goods) Act 1977 must be brought within six years of the cause of action accruing¹. A claim in negligence is also subject to the six year limitation period from the accrual of the claim, except in the case of personal injuries where, in general, a three year time limit from the accrual of the cause of action, or the date of knowledge (if later), applies².

In the case of a conversion, the limitation period begins to run from the date of the conversion, and, subject to fraud by the defendant³, this is so even where the owner does not become aware of the conversion until later⁴. In a case of conversion by wrongful detention alone, time

runs from the refusal of a lawful demand for the return of the goods in question⁵ or their equivalent.

In the case of successive conversions or detentions, time normally runs from the accrual of the cause of action in respect of the original conversion or detention⁶.

Special provisions apply to the limitation of actions for damages brought under Part I of the Consumer Protection Act 1987⁷.

1 Limitation Act 1980 s 2. A claim may also, where appropriate, be brought in contract where there is also a six year limitation period (s 5), but the accrual of a claim in contract is rarely later than the accrual of the cause of action in tort. See generally LIMITATION PERIODS. As to special periods of limitation see LIMITATION PERIODS vol 68 (2008) PARA 998 et seq; as to general periods of limitation see LIMITATION PERIODS vol 68 (2008) PARAS 952-954; as to title deeds see LIMITATION PERIODS vol 68 (2008) PARA 992; and as to property converted by a trustee see LIMITATION PERIODS vol 68 (2008) PARA 1142. As to pleading cf CIVIL PROCEDURE; LIMITATION PERIODS vol 68 (2008) PARA 943 et seq.

2 See ibid ss 11-13 (as amended); and LIMITATION PERIODS. As to the date of knowledge see s 14 (amended by the Consumer Protection Act 1987 s 6, Sch 1 Pt I para 3). As to the discretion to extend the time limit see the Limitation Act 1980 s 33 (amended by the Consumer Protection Act 1987 Sch 1 Pt I para 6).

3 See the Limitation Act 1980 s 32 (amended by the Consumer Protection Act 1987 s 6, Sch 1 Pt I para 5; and the Latent Damage Act 1986 s 2(2)); and cf LIMITATION PERIODS vol 68 (2008) PARA 1220 et seq.

4 *Granger v George* (1826) 5 B & C 149; *RB Policies at Lloyd's v Butler* [1950] 1 KB 76, [1949] 2 All ER 226. However, the limitation period may not run where the goods have been stolen from the claimant: see the Limitation Act 1980 s 4; and LIMITATION PERIODS vol 68 (2008) PARA 990. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq.

5 *Philpott v Kelley* (1835) 3 Ad & El 106; *Miller v Dell* [1891] 1 QB 468, CA. It appears that a demand and refusal is still required under the Torts (Interference with Goods) Act 1977 s 2(2) because the provision assumes that the bailee's default would formerly have given rise to an action in detinue, and such an action had to be prefaced by a demand.

6 See the Limitation Act 1980 s 3(1); and cf LIMITATION PERIODS vol 68 (2008) PARA 988. There is a special time limit for goods which are converted by theft: see s 4; and LIMITATION PERIODS vol 68 (2008) PARA 990. As to the extent that bailment could be regarded as an independent cause of action rather than being framed as a claim in contract or tort for the purposes of limitation periods see *KH Enterprise v Pioneer Container, The Pioneer Container* [1994] 2 AC 324 at 340-342, [1994] 2 All ER 250 at 260-262, [1994] 1 Lloyd's Rep 593 at 600-602, PC; *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86 at 90, CA; *Sandeman Coprimar SA v Transitos y Integrales SL* [2003] EWCA Civ 113 at [59], [2003] QB 1270 at [59], [2003] 3 All ER 108 at [59], [2003] 2 Lloyd's Rep 172 at [59]; *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247 per Lord Denning at 260-261. See also para 41 ante.

7 See the Limitation Act 1980 s 11A (as added); and LIMITATION PERIODS vol 68 (2008) PARA 1003; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 527. As to the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended) see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 518 et seq.

UPDATE

87-88 Limitation of actions, Bailor's right to sue

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/ (3) RIGHTS AND OBLIGATIONS AS REGARDS THIRD PERSONS/88. Bailor's right to sue.

(3) RIGHTS AND OBLIGATIONS AS REGARDS THIRD PERSONS

88. Bailor's right to sue.

Where there has been a sub-bailment¹ the owner has concurrent rights with the bailee against the sub-bailee; and if the owner has consented to the sub-bailment he will be bound by the terms of the sub-bailment contract².

Where the owner of a chattel has, under a contract of bailment, deprived himself of his right to its use or possession for a time, as in the case of hiring for reward or of pledge, he cannot during that time bring a claim for the conversion³ of the chattel⁴ unless the act of conversion adversely affects his reversionary interest or his absolute property in it, such as by destroying the chattel or permanently injuring it⁵.

Where the bailee is merely a bailee during pleasure, as is the case in any gratuitous bailment⁶, or under any contract of carriage where the terms of carriage do not specifically deal with this question⁷, the bailor may, by reason of his immediate right of possession, sue for the conversion of the chattel a third party who wrongfully takes it out of the bailee's possession, for an end has been put to the bailment⁸.

A bailor who can at any moment demand the return of the object bailed has been said to have possession throughout the continuance of the bailment, for he has the right to immediate possession and by reason of this right can exercise those possessory remedies which are available to the possessor⁹. But the preferable modern view appears to be that the bailee has possession even under bailment at will¹⁰.

Further, where the bailee, by a wrongful dealing with the chattel, has determined the bailment, all third persons, however innocent, who purport in any way to deal with the property in the chattel¹¹ are guilty of conversion and liable to the bailor¹², unless protected by the Factors Act 1889¹³.

1 See para 41 ante.

2 *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164; *East West Corpn v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; and see para 41 ante.

3 *Gordon v Harper* (1796) 7 Term Rep 9. Still less can he maintain a claim of trespass. As to conversion generally see TORT vol 45(2) (Reissue) para 548 et seq.

4 *Bradley v Copley* (1845) 1 CB 685 at 697 per Tindal CJ. For the same reason the purchaser of goods retained by the vendor in exercise of his lien cannot maintain trover. As to trover or conversion (included in wrongful interference with goods) see TORT vol 45(2) (Reissue) para 542 et seq.

5 *Mears v London and South Western Rly Co* (1862) 11 CBNS 850; *Hall v Pickard* (1812) 3 Camp 187; *Meux v Great Eastern Rly Co* [1895] 2 QB 387, CA; *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA; *East West Corpn v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700. The third person cannot defend himself by pleading that the injury was due to the joint negligence of himself and the bailee: *Wellwood v King Ltd* [1921] 2 IR 274, CA. The owner, however, must prove damage to his interest: *Tancred v Allgood* (1859) 4 H & N 438. See also *Kuwait Airways Corpn v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209.

6 *Nicolls v Bastard* (1835) 2 Cr M & R 659; *Manders v Williams* (1849) 4 Exch 339. The owner may, perhaps, even maintain trespass.

7 *Gordon v Harper* (1796) 7 Term Rep 9 at 12 per Grove J. But the terms of the contract of carriage will often provide otherwise and will, if so, deprive the bailment of its character as a bailment at will: *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 134-135, CA, per Slade LJ.

8 'No proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer, the latter by virtue of his possession, the former by reason of his

property': *Manders v Williams* (1849) 4 Exch 339 at 344 per Parke B. A claim by one, however, is a bar to a claim by the other: *Nicolls v Bastard* (1835) 2 Cr M & R 659 at 660 per Parke B. See also *O'Sullivan v Williams* [1992] 3 All ER 385, [1992] RTR 402, [1992] NLJR 717, CA. As to the bailor's right to sue see also DAMAGES vol 12(1) (Reissue) paras 1103-1104.

9 See *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582 at 605, [1952] 1 All ER 572 at 581, HL, per Earl Jowitt, and at 611 and 585 per Lord Porter. The person having the right to immediate possession is not infrequently referred to in English law as being the possessor.

10 Cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, CA. See also *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA.

11 *Barker v Furlong* [1891] 2 Ch 172. See also *Wilson v Lombank Ltd* [1963] 1 All ER 740, [1963] 1 WLR 1294. But certain classes of possessor, who receive the possession of goods from someone who has no right to their possession and later return the goods to that person, may avoid liability in conversion to the true owner, if (inter alia) they can show that they acted in good faith and had no notice of any adverse claim: *Hollins v Fowler* (1875) LR 7 HL 757 at 766 per Blackburn J; *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561.

12 *Cooper v Willomatt* (1845) 1 CB 672; *Bryant v Wardell* (1848) 2 Exch 479; *Fenn v Bittleston* (1851) 7 Exch 152 at 159; *Loeschman v Machin* (1818) 2 Stark 311; *Consolidated Co v Curtis & Son* [1892] 1 QB 495; *North Central Wagon and Finance Co Ltd v Graham* [1950] 2 KB 7, [1950] 1 All ER 780, CA; *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, [2004] QB 286, [2003] 3 All ER 561. See also *Union Transport Finance Ltd v British Car Auctions Ltd* [1978] 2 All ER 385, applying *North Central Wagon and Finance Co Ltd v Graham* supra. See also *Chubb Cash Ltd v John Crilley & Son (a firm)* [1983] 2 All ER 294, [1983] 1 WLR 599, CA; *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA. It is not certain whether a premature sale or sub-pledge by a pledgee determines the bailment within the meaning of the rule: see *Johnson (Assignee of Cumming) v Stear* (1863) 15 CBNS 330; *Donald v Suckling* (1866) LR 1 QB 585; *Halliday v Holgate* (1868) LR 3 Exch 299; and PLEDGES AND PAWNS vol 36(1) (2007 Reissue) paras 21, 24. But if the holder of a lien wrongfully parts with the goods the bailment is determined: *Scott v Newington* (1833) 1 Mood & R 252; *Donald v Suckling* supra at 604 per Mellor J; *Mulliner v Florence* (1878) 3 QBD 484, CA.

13 See the Factors Act 1889 s 2; and AGENCY vol 1 (2008) PARA 148. A further protection used to be sales in market overt but this doctrine (which was contained in the Sale of Goods Act 1979 s 22(1)) was abolished by the Sale of Goods (Amendment) Act 1994 s 1: see MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) para 1026; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 23. See also para 11 note 11 ante.

UPDATE

87-88 Limitation of actions, Bailor's right to sue

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

88 Bailor's right to sue

NOTES--See *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd (formerly Railtrack plc)* [2005] EWCA Civ 1437, [2006] 1 All ER 343, [2006] 1 WLR 643.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/ (3) RIGHTS AND OBLIGATIONS AS REGARDS THIRD PERSONS/89. Bailee's right to sue.

89. Bailee's right to sue.

In accordance with the general principle of law that possession gives title as against a stranger¹, the bailee of a chattel under any species of bailment may at common law sue for the

tort of trespass or conversion or maintain a claim for damages for the destruction of, or injury to, the chattel against the wrongdoer in all cases in which an absolute owner of a chattel may do so, and may recover in each case the same damages as he could if he were the absolute owner². Thus in proceedings by a bailee against a third party in respect of the destruction of, or damage to, the chattel bailed³, the bailee may at common law recover the full value of the chattel in respect of its destruction or the full cost of repairing any damage to it, and in addition any further damage which he may personally sustain by reason of his being deprived of its use while it is being repaired⁴.

The fact that the bailee is under no responsibility to the bailor for the loss of or damage to the goods resulting from the act of the tortfeasor does not at common law avoid his right of action against him; for the common law rule that the wrongdoer cannot set up against the person in possession the *jus tertii*, unless he is claiming under it, is absolute, and the relation between the bailor and the bailee is immaterial⁵.

The common law rule that a wrongdoer cannot plead the *jus tertii* in defence to a claim by a bailee has been substantially abrogated by statute⁶. The defendant in a claim for wrongful interference with goods⁷ is entitled to show, in accordance with rules of court⁸, that a third person has a better right than the claimant as regards all or any part of the interest claimed by the claimant, or in right of which he sues⁹. This provision therefore displaces the bailee's former entitlement to recover full damages from a third party wrongdoer, except where the wrongdoer elects not to plead the *jus tertii*, or there is an exception to the operation of the provision¹⁰, or (perhaps) where the bailee sues otherwise than in tort¹¹.

A bailee who is not merely a bailee during pleasure may sue the bailor for the tort of conversion if the bailor wrongfully deprives him of the chattel¹².

1 This principle has been substantially abrogated by statute: see the Torts (Interference with Goods) Act 1977 s 8; and the text and notes 6-11 infra. For procedural rules concerning parties in claims for wrongful interference with goods, and the power of the court to order, in certain circumstances, that certain persons be deprived of the right to bring a claim against the defendant, see CPR 19.5A; and CIVIL PROCEDURE.

2 *Burton v Hughes* (1824) 2 Bing 173 at 175 per Best CJ; *Rooth v Wilson* (1817) 1 B & Ald 59; *Croft v Alison* (1821) 4 B & Ald 590; *Raynor v Childs* (1862) 2 F & F 775; *Sutton v Buck* (1810) 2 Taunt 302; *The Winkfield* [1902] P 42, CA (where the cases are reviewed); *The Okehampton* [1913] P 173, CA; *East West Corpn v DKBS AF 1912 A/S*, *Utaniko Ltd v P & O Nedlloyd BV* [2003] EWCA Civ 83, [2003] QB 1509, [2003] 2 All ER 700; *O'Sullivan v Williams* [1992] 3 All ER 385, [1992] RTR 402, [1992] NLJR 717, CA; *Chartered Trust v King* [2001] All ER (D) 310 (Feb), Ch. See also para 13 ante. As to the measure of damages see paras 46, 86 ante. As to the bailee's right to sue see also DAMAGES vol 12(1) (Reissue) paras 1100-1102.

3 For the bailor's right to bring such proceedings see para 88 ante; and DAMAGES vol 12(1) (Reissue) paras 1103-1104.

4 For exceptions, see Palmer *Bailment* (2nd Edn, 1991) p 316 (and also see at pp 308, 335) approved in *Chartered Trust v King* [2001] All ER (D) 310 (Feb), Ch. As to the measure of damages where the chattel is being used other than for profit see *The Greta Holme* [1897] AC 596, HL; *Mersey Docks and Harbour Board v Marpessa (Owners)* [1907] AC 241, HL. See also *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, [2003] 3 All ER 108, [2003] 2 Lloyd's Rep 172, CA; and para 86 ante. In Admiralty cases the bailee can recover interest from the date of damage: *The Rosalind* (1920) 90 LJP 126. The court has a general power to award interest on damages: see the Supreme Court Act 1981 s 35A (as added); and DAMAGES vol 12(1) (Reissue) para 848.

5 *The Winkfield* [1902] P 42, CA, overruling *Claridge v South Staffordshire Tramway Co* [1892] 1 QB 422; *Worthington v Tipperary County Council* [1920] 2 IR 233, CA. See para 90 note 2 post. However, see *O'Sullivan v Williams* [1992] 3 All ER 385, CA (bailor's claim for damages was settled, which put an end to any further claim by the bailee as the bailor's damages in respect of the goods included whatever use the bailor chose to permit the bailee to make of them).

6 See the Torts (Interference with Goods) Act 1977 s 8(1); and TORT vol 45(2) (Reissue) para 644.

7 the trespass to goods, conversion (or trover), negligence so far as it results in damage to goods or to an interest in goods, and any other tort so far as it results in damage to goods or to an interest in goods: see *ibid* s 1(1); and TORT vol 45(2) (Reissue) para 545.

8 As to the power to make rules see *ibid* s 8(2); and TORT vol 45(2) (Reissue) para 644. This power is without prejudice to any other power of making rules of court: s 8(3).

9 See *ibid* s 8(1). This provision also states that any rule of law to the contrary (sometimes called *jus tertii*) is abolished.

10 See TORT vol 45(2) (Reissue) para 644.

11 Cf TORT vol 45(2) (Reissue) para 644.

12 *Roberts v Wyatt* (1810) 2 Taunt 268; cf *Graig v Shedden* (1859) 1 F & F 553; *Sands v Shedden* (1851) 1 F & F 556; *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA; *Chartered Trust v King* [2001] All ER (D) 310 (Feb), Ch; and see para 50 note 5 ante.

UPDATE

89 Bailee's right to sue

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/ (3) RIGHTS AND OBLIGATIONS AS REGARDS THIRD PERSONS/90. Bailee's duty to account to bailor.

90. Bailee's duty to account to bailor.

As between himself and the bailor, the bailee must account to the bailor for everything that he may recover from a third person beyond his own interest¹, and must therefore pay over to him any sum which he has recovered as representing the value of the chattel, its permanent deterioration, or the cost of repairing it if he has not himself repaired it. If the bailee sues, therefore, he ought in general to claim and be awarded the full damages, for then no further claim can be brought by the bailor².

1 *Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* [1914] AC 197 at 210, PC; *The Joannis Vatis* [1922] P 92, CA; *Chartered Trust v King* [2001] All ER (D) 310 (Feb), Ch; and see paras 84, 89 note 5 ante; and TORT vol 45(2) (Reissue) paras 631, 644. See also Palmer *Bailment* (2nd Edn, 1991) pp 335-340.

2 *Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* [1914] AC 197, PC; *Worthington v Tipperary County Council* [1920] 2 IR 233, CA, per O'Connor MR; and see para 88 note 8 ante; Palmer *Bailment* (2nd Edn, 1991) ch 4. If, however, the bailor has, before action, transferred to the wrongdoer the ownership of the goods, the bailee cannot recover more than the value of his own interest, and the wrongdoer in relying on such a transfer is not setting up a *jus tertii* but a *jus sui*: *Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* *supra*.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/ (3) RIGHTS AND OBLIGATIONS AS REGARDS THIRD PERSONS/91. Liability of bailee and bailor to third persons.

91. Liability of bailee and bailor to third persons.

At common law, the bailee alone is responsible to third parties for any injury which they may sustain by reason of his negligence or other wrongful act in the control or management of the chattel, for he is not the agent of the bailor in this connection¹.

On the other hand, if the owner of a chattel, though he places it at the disposal of someone else, retains control over it by himself or his servants, so that there is no bailment, he remains responsible to third parties for any injury or damage caused by negligence in its management² or by the dangerous qualities of the chattel itself; but in this latter case his liability is not dependent upon his retaining a measure of control and extends to any person he knows or ought to have contemplated might use it³.

Whether there is a bailment or not is a question which must depend upon the particular circumstances of the case⁴.

In other respects the question of liability to third parties is determined by general principles. The bailee is liable for the acts of his servants acting within the scope of their employment, but not for their unauthorised acts when acting outside the scope of their employment⁵.

1 *Smith v Bailey* [1891] 2 QB 403, CA; *Gibson v O'Keeney* [1928] NI 66, CA; *Britt v Galmoye and Nevill* (1928) 44 TLR 294; *Hewitt v Bonvin* [1940] 1 KB 188, CA; *Everett's Blinds Ltd v Thomas Ballinger Ltd* [1965] NZLR 266, NZ CA. Cf *Wellwood v King Ltd* [1921] 2 IR 274, CA; and EMPLOYMENT. As to the bailor's liability under the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended) see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 533 et seq. Under the London Hackney Carriages Act 1843, the proprietor of a cab is liable for the negligence of the driver, even though the driver is not his servant but only a bailee: see *Venables v Smith* (1877) 2 QBD 279; *Smith v General Motor Cab Ltd* [1911] AC 188, HL (and the cases cited at 192 by Lord Atkinson); and ROAD TRAFFIC vol 40(3) (2007 Reissue) paras 1477 et seq, 1491.

2 *Reichardt v Shard* (1914) 31 TLR 24, CA; *Samson v Aitchison* [1912] AC 844, PC; *Pratt v Patrick* [1924] 1 KB 488; *Ormrod v Crosville Motor Services Ltd (Murphie, third party)* [1953] 1 All ER 711, [1953] 1 WLR 409; and see TORT vol 45(2) (Reissue) para 816.

3 *White v Steadman* [1913] 3 KB 340 at 347; *Griffiths v Arch Engineering Co (Newport) Ltd* [1968] 3 All ER 217. The bailor may have a defence to a claim by the third party in respect of the defective condition of the chattel if he has given the bailee a sufficient warning about that condition: *Pivovarov v Chernabaeff* (1978) 21 SASR 1, 5 Aust SC, FC; and see *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225, sub nom *Lambert v Lewis* [1981] 1 All ER 1185, HL; *Hurley v Dyke* [1979] RTR 265, HL. Cf *Hadley v Droitwich Construction Co Ltd* [1967] 3 All ER 911, [1968] 1 WLR 37, CA.

4 To prove a bailment, the owner must show that he had let out the chattel to a hirer and that the hirer or his agent had control over it to the exclusion of all interference with the working or management either by the owner or his agents: *Smith v Bailey* [1891] 2 QB 403, CA; *Nicholson v Harrison* (1856) 27 LTOS 56. See also para 1 ante; Palmer *Bailment* (2nd Edn, 1991) ch 7.

5 See eg the cases cited in para 42 notes 1-4 ante. As to liability for a servant's acts see AGENCY vol 1 (2008) PARA 121 et seq; TORT vol 45(2) (Reissue) para 814 et seq. As to liability where a servant is hired by one employer from another see *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1, [1946] 2 All ER 345, HL; and TORT vol 45(2) (Reissue) paras 802-805.

UPDATE

91-92 Liability of bailee and bailor to third persons, Modification of liability in respect of war loss or damage

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BAILMENT (VOLUME 3(1) (2005 REISSUE))/4. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT/ (4) WAR DAMAGE/92. Modification of liability in respect of war loss or damage.

(4) WAR DAMAGE

92. Modification of liability in respect of war loss or damage.

Certain obligations of a bailor or bailee, whether imposed by the provisions (express or implied) of a contract or by any enactment, rule of law or custom, are deemed not to extend to loss or damage by war¹. The obligations in respect of which this exception applies are obligations to insure against loss of or damage to the goods²; to repair damage to the goods; to replace the goods in the event of loss; to restore the goods or deliver them up in good repair, notwithstanding such loss or damage; to continue to pay for the hire of the goods; and to pay damages or compensation for any loss of or damage to the goods³.

A bailee is not, however, relieved from any liability for loss of or damage to goods occurring while they are being kept or transported in a manner or at a place which is contrary to the terms of any contract relating to their custody or transport⁴ unless he satisfies the court that he had reasonable grounds for believing that the goods were less likely to be lost or damaged while being so kept or transported than while being kept or transported in accordance with the terms of the contract⁵. Nor is a bailee or bailor relieved of any contractual liability which is expressly related to war by the terms of the contract⁶, other than, in the case of a bailee, a liability imposed by: (1) a hire-purchase agreement or a conditional sale agreement within the meaning of the Consumer Credit Act 1974 being (in either case) a consumer credit agreement defined by that Act; or (2) a consumer hire agreement as defined by that Act⁷.

1 Liability for War Damage (Miscellaneous Provisions) Act 1939 s 1(1). For this purpose, 'loss by war' and 'damage by war' mean respectively loss (including destruction) and damage caused by or in repelling enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by or in repelling enemy action: s 8(2). The onus is on the party seeking to avoid liability to establish that the loss or damage was loss or damage by war: *Re S Davis & Co Ltd* [1945] Ch 402 at 407 (goods stored in premises which were damaged by enemy action); cf *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA (goods entrusted by bailee to third party without bailor's knowledge; third party's premises damaged by bomb; goods subsequently lost; bailee was held to be in breach of contract and liable for loss).

2 As to insurance schemes in respect of war damage to ships and aircraft cargoes under the Marine and Aviation Insurance (War Risks) Act 1952 see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) para 533.

3 Liability for War Damage (Miscellaneous Provisions) Act 1939 s 1(1).

4 As to the general liability of a bailee who deals with the goods entrusted to him in an unauthorised manner see paras 19, 25, 33, 39 ante.

5 Liability for War Damage (Miscellaneous Provisions) Act 1939 s 1(2).

6 Ibid s 1(3).

7 Ibid s 1(3) proviso (amended by the Consumer Credit Act 1974 s 192(3)(a), Sch 4 Pt I para 9). See CONSUMER CREDIT vol 9(1) (Reissue) paras 23 et seq, 45 et seq.

UPDATE

91-92 Liability of bailee and bailor to third persons, Modification of liability in respect of war loss or damage

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

92 Modification of liability in respect of war loss or damage

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.